#### UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

#### D-20

# Government Response to Defense Motion to Compel Production of Documents

11 February 2008

- 1. <u>Timeliness</u>: This motion is filed within the timeframe established by the Military Judge at the Trial Session held on 7 February 2008.
- **Relief Sought:** The Defense motion to compel production of documents is denied because the Government has complied with its discovery obligations.
- 3. Overview: The defense has requested the Military Judge order the production of:

"all records relating to the accused's confinement, including but not limited to; visitor logs; disciplinary records; Standards of Conduct/Standard Operating Procedures (SOPs) for guards during the time the accused was confined; records/memoranda prepared by the U.S. Government concerning the accused; interrogations conducted while he was in the custody of the U.S. Government, including notes and plans for interrogations; list of interrogation techniques authorized for use while the accused was confined; and involvement of the Behavioral Science Consultation teams (BSCTs) in the planning and execution of the interrogation sessions. This includes all JTF-Guantanamo documents referenced in paragraph 1.d. of JTG C G Memorandum of 4 September 2004, from MG Geoffrey D. Miller."

The Government has complied with its discovery obligations with respect to these documents.

4. <u>Burden and Standard of Proof</u>: The burden of persuasion on this motion rests with the defense. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

## 5. Facts:

- A. On 20 December 2007 the Military Judge ordered Prosecution to complete discovery by 31 December 20.
- B. On 21 December and 31 December 2007 the Prosecution provided Defense with Discovery.
- C. On 31 December 2007, the Prosecution notified Defense via e-mail of its intent to deny the majority of this outstanding request, attachment (A).
- D. On 1 February 2008, Defense filed a motion seeking credit for "improper pre-trial confinement" and notified the Prosecution of its intent to file a motion with the court requesting an order to compel the production of the documents listed above.

- E. On 5 February 2008, Prosecution responded to the outstanding discovery, (Attachment B), focusing on those documents that were created and held by the JTF-GTMO.
- F. On 7 February 2008, the Military Judge ordered the Prosecution to respond to the Defense discovery motion by Monday, 11 February 2008.
- G. On 11 February 2008, Prosecution provided additional information to the Defense, consisting of two additional contact numbers, JTF-GTMO detention documents from 2002, known recreation records of the accused, and past editions of the JTF Standard Operating Procedures, (Attachment C).
- 6. Law and Argument: Rule for Military Commission 701 and 703 establishes the standard for discovery in military courts: Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence. See also, 10 U.S.C. § 949j (2006). This response answers the request for "all records relating to the accused's confinement," by separating the request and outlining the Government's position on each type of document.
- A. Visitor logs There are no known visitor logs for the accused. The JTF-GTMO detained movement record was provided on February 5, 2008. That document shows the movements of the accused, thereby verifying movements for interrogation.
- B. Disciplinary records; All known disciplinary records have been provided to the Defense. The Prosecution provided discipline records on three occasions September 10, 2004; February 5, 2008, and then again today, February 11, 2008). I believe the February 11, 2008 release of these documents may be a redundant release to the September 10, 2004 release.
- C. Standards of Conduct/Standard Operating Procedures (SOPs) for guards during the time the accused was confined; per attachment B, standard operating procedures for guards at Guantanamo Bay, Cuba were provided on February 5, 2008. On February 11, 2008 electronic copies of the 2003 and 2005 Standard Operating Procedures for Guantanamo Bay, Cuba were provided.
- D. Records/memoranda prepared by the U.S. Government concerning the accused; The Prosecution has thoroughly culled a variety of sources of information and has provided all the known discoverable records associated with the accused. If the Defense believes additional discoverable documents exist, the Defense needs to notify the prosecution regarding its belief regarding these documents with enough specificity that it can verify the addition of any additional discoverable documents.
- E. Interrogations conducted while he was in the custody of the U.S. Government, including notes and plans for interrogations; Consistent with attachment B, all known interrogation notes and plans for interrogations have provided Defense.

- F. List of interrogation techniques authorized for use while the accused was confined; Consistent with attachment B, a list of interrogation techniques authorized for use while the accused was confined was denied. However, all known interrogation techniques authorized for use on the accused are contained with AR 34-52, a copy of which was provided Defense.
- G. Involvement of the Behavioral Science Consultation Teams (BSCTs) in the planning and execution of the interrogation sessions. This includes all JTF-Guantanamo documents referenced in paragraph 1.d. of JTG C G Memorandum of 4 September 2004, from MG Geoffrey D. Miller." The BSCT were not involved in the planning or execution of any interrogation session. Therefore, no documents exist. Attachment B reported this information to the Defense.
- 7. Request for Oral Argument: The Defense made oral argument. At this time oral argument is unnecessary in that the Government has complied with its discovery obligations under RMC 701 and 703 et al.
- **8.** <u>Conference with Opposing Counsel</u>: The Prosecution is responding to the order of the Military Judge and has therefore not conferred with the Defense.

Respectfully submitted,

WILLIAM B. BRITT

LTC, JA

**PROSECUTOR** 

TIMOTHY D. STONE

LCDR, JAGC, USN

ASSISTANT PROSECUTOR

MR. JOHN MURPHY

DEPARTMENT OF JUSTICE ASSISTANT PROSECUTOR

## MEMORANDUM FOR THE DEFENSE IN THE CASE OF SALIM AHMED HAMDAN

FROM: Office of the Chief Prosecutor, Office of Military Commissions

SUBJECT: Response to the Request for Discovery- U.S. v. SALIM AHMED HAMDAN

ENCLOSURE: (1) JDIMS detained movement record

- (2) Disciplinary Record of the Defendant
- (3) Current Standard Operating Procedures for Guards
- (4) Army Field Manual 34-52
- 1. This memorandum responds to the unanswered portion of the 21 May 2007 defense discovery request in the above captioned case. In doing so, it memorializes an electronic mail sent from the Prosecution to the Defense on 31 Dec 07, notifying the Defense which requests it intended to deny the remainder of the discovery, but would follow-up that e-mail with a formal letter. At dispute is the following requested information:

All records relating to the accused's confinement including but not limited to: visitor logs; disciplinary records; standards of conduct/standard operating procedures (SOPs) for guards during the time the accused was confined; records/memoranda prepared by the U.S. Government concerning the accused; interrogations conducted while he was in custody of the U.S. Government, including notes and plans for interrogations; list of interrogation techniques authorized for use while the accused was confined; and involvement of the Behavioral Science Consultation Teams (BSCTs) in the planning and execution of interrogation sessions. This includes all JTF-Guantanamo documents referenced in paragraph 1.d. of JTF CG Memorandum of 4 September 2003, from MG Geoffrey D. Miller.

- 2. While the Prosecution had intended to deny the bulk of the otherwise unreleased information, the motion (D-019) filed by Defense on 31 January has made some of these documents relevant and are therefore now being released in discovery. Note, enclosures (1)-(3) are sensitive "For Official Use Only" documents that are covered under the current protective order #2, dated August 27, 2004.
- 3. There are no retained visitor logs with respect to the accused. Detained movements and cell locations are contained in a detained movement report, which is contained herein, enclosure (1).
- 4. The disciplinary logs are enclosure (2).
- 5. The current standard operating procedures for guards during the time the accused was confined is provided as enclosure (3). Prosecution will provide Defense previous versions of JTF-GTMO Standard Operating Procedures when turned over to us.

- 6. All known records and memoranda prepared by the United States Government concerning the Accused have previously been discovered.
- 7. All known interrogations conducted of the accused while he was in custody of the U.S. Government have previously been disclosed to the Defense, including any notes and plans for interrogations.
- 8. A list of all known interrogation techniques authorized for use while the accused was confined is denied as beyond the scope of discovery. However, the written interrogation notes or memorandums, to the extent they exist, regarding each interrogation have previously been provided. Also, copies of the Army Field Interrogation manual 34-52 that was applicable during the time in which the defendant was questioned is provided, enclosure (4). The 1992 version is available at: <a href="http://www.fas.org/irp/doddir/army/fm34-52.pdf">http://www.fas.org/irp/doddir/army/fm34-52.pdf</a>
- 9. As previously reported to LCDR Mizer, the Behavioral Science Consultation Teams (BSCTs) were not involved in the planning and execution of interrogation sessions and thus, no files exist.

Very Respectfully,

William B. Britt

LTC, JA

Prosecutor

Timothy D. Stone LCDR, JAGC, USN

Assistant Prosecutor

Mr. John Murphy

Attorney, U.S. Department of Justice

Assistant Prosecutor

//s//

Clayton Trivett

Attorney, U.S. Department of Defense

Assistant Prosecutor

#### MEMORANDUM FOR THE DEFENSE IN THE CASE OF SALIM AHMED HAMDAN

FROM: Office of the Chief Prosecutor, Office of Military Commissions

SUBJECT: Response to the Request for Discovery- U.S. v. SALIM AHMED HAMDAN

ENCLOSURES: (1) Recreation records of the Accused

- (2) Known discipline records of the Accused
- 1. This memorandum provides additional discovery, completing the 21 May 2007 defense discovery request in the above captioned case.
- 2. Enclosure (1) is the recreation records of the accused. While these records would otherwise be irrelevant, they have become relevant due to the pending motion for pre-trial confinement.
- 3. Enclosure (2) is copies of additional discipline records of the Accused, dating back to 2002. all known discipline records of the accused that were ever created while the accused was detained at Guantanamo Bay, have been located and released to Defense. Please note, additional GTMO camp records were released to Defense on September 10, 2004.
- 4. This memorializes that the accused's medical record was provided to the Defense on 8 February 2008. By separate e-mail correspondence, the Defense was provided a copy of the JTF-GTMO 2003 Standard Operating Procedure.
- 5. Specialist was a military interrogator at the Kandahar detention facility. He can be reached at (404) 376-1290. He has left active duty, but can be reached at this number.
- 6. While this may or may not require disclosure, the Prosecution nonetheless provides the following: while interviewing Lieutenant Colonel USA, on January 18, 2008, regarding this case, the Prosecution learned that shortly after his arrival at Bagram Airfield in late December 2001, the Defendant made a statement to U.S. Forces that confirmed his identity, where he was from, and the fact that he was associated with Osama Bin Laden.

7. LTC was unable to identify with any specificity the individual who	took the
statement, nor is he aware of any notes or recordings made of the statement. V	Vhile the
Prosecution has no other information about the statement, it nonetheless believes the	
information is reliable and decided to turn it over. The prosecution does not intend to call	
LTC on the merits of the case, but he may be reached at	or by email at
or by mail at l	

8. The Prosecution continues to recognize its ongoing discovery obligations and, if it finds any additional information that falls within its continuing discovery obligations it will comply at first opportunity. At this time that is required to be disclosed.

Very Respectfully,

//s//

William B. Britt

LTC, JA, USA(R)

Prosecutor

//s//

Mr. John F. Murphy

Attorney, U.S. Department of Justice

Assistant Prosecutor

Timothy D. Stone

LCDR, JAGC, USN

Assistant Prosecutor

//s//

Clayton Trivett

Attorney, U.S. Department of Defense

**Assistant Prosecutor** 

From: Stone, Tim, LCDR, DoD OGC

To:

**Subject:** FW: Hamdan discovery

**Date:** Monday, February 11, 2008 2:23:32 PM

From: Stone, Tim, LCDR, DoD OGC
Sent: Monday, December 31, 2007 11:12

To: Mizer, Brian, LT, DoD OGC

Cc: Britt, William, LTC, DoD OGC; j

**Subject:** Hamdan discovery

LT Mizer:

MSGT just went to turn over what we consider is essentially the last major piece of discovery. There are a couple of documents that we intend to discover or have provided that the Defense has asked for, but we have not yet received yet.

- 1) JTF GTMO will make the medical record available to you, so long as your client signs a release. This is JTF GTMO standard practice and they can facilitate this.
- 2) The notes from the Crouch/Soufan interview that Mr. Schneider asked to be produced during the hearing, will be provided, once we get a copy of them. My understanding is they have been located and will be forwarded. When we get them, we will forward to you.
- 3) The Prosecution will respond with a formal discovery response regarding subsection (i) of your discovery request. We felt necessary to let you know up front what this response will be. Most of these documents deal with JTF GTMO. JTF GTMO has been extremely helpful in helping answer this request and there is no reason to think it will not continue. Your request specifically asked for:

All records relating to the Accused's confinement, including but not limited to: visitor logs; disciplinary records; standards of conduct/standard operating procedures (SOPs) for guards during the time the Accused was confined; records/memoranda prepared by the U.S. Government concerning the accused; interrogations conducted while he was in custody of the U.S. Government, including notes and plans for interrogations; list of interrogation techniques

authorized for use while the Accused was confined; and involvement of the Behavioral Science Consultation Teams (BSCTs) in the planning and execution of interrogation sessions. This includes all JTF-Guantanamo documents referenced in paragraph 1.d. of JTF CG Memorandum of 4 September 2003, from MG Geoffrey D. Miller.

The response will deny the majority of this request as either being overly broad, irrelevant or beyond the scope of discovery. Please note, we believe we have provided you all interrogations conducted while your client was in custody of the U.S. Government and the notes. Also, you asked for records and memoranda prepared by the U.S. Government concerning the accused, we view this as an overbroad request and ask you to be more specific regarding types of records and memoranda you are requesting. If you are more specific here, we can make an informed decision.

- 4) Since discovery is an ongoing obligation, I cannot guarantee that there will be a few things that will trickle in. While we do not know of anything that will "trickle in" that we did not identify,I am sure there will be a couple of things that will require us to provide. When/if we get those, they will be made available as soon as possible.
- 5) We will file a recriprocal discovery request this week.

Please let me or the other members of the Prosecution know if you have any questions.

v/r LCDR Tim Stone From: Stone, Tim, LCDR, DoD OGC

Sent: Monday, February 11, 2008 4:34 PM

To: Prasow, Andrea, Ms, DoD OGC;

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC;

; David, Steven, COL, DoD OGC;

DoD

OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LT, DoD OGC; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; Murphy, John, Mr, DoD OGC; Schneider, Harry (Perkins

Coie); Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

**Subject:** Government Response to D-20

Follow Up Flag: Follow up Flag Status: Completed

Attachments: FW\_ Hamdan discovery.pdf; Discovery Response - 5 Feb 08.pdf; Discovery Response - 11

Feb 08.pdf; D-20 Govt Response - Hamdan.pdf

Per the Court verbal order of 7 Feb 08, the following information is provided.

Government response D-20 is provided. Attachment A is Hamdan discovery, Attachment B is 5 Feb response, Attachment C is 11 Feb response.

From:
Sent: Friday, February 15, 2008 5:36 PM

To: Prasow, Andrea, Ms, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD

OGC; Mizer, Brian, LCDR, DoD OGC; ', Murphy, John, Mr, DoD

OGC

Cc: Berrigan, Michael, Mr, DoD; David, Steven, COL, DoD

OGC;

DoD OGC; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC;

'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC;

'McCarthy, Patrick CAPT USSOUTHCOM JTFGTMO'; Ridenour, Alan, Mr, DoD OGC;

; Kelly, Wendy, COL, DoD OGC; , Mr, DoD OGC;

Morganti, Mark, CW4, DoD OGC; USSOUTHCOM JTFGTMO'

Subject: FW: U.S. v. Haman - Special Request for Relief - Request for Continuance - RULING

CAPT Allred has directed that I send the email below to counsel and other interested persons.

v/r,

LTC , USAR Seni dvisor

Military Commissions Trial Judiciary

Department of Defense

----Original Message---From: Allred, Keith J CAPT
Sent ry 15,
To: LTC, DoD OGC

Subj Haman - Special Request for Relief - Request for Continuance - RULING

LTC

Please forward this email to counsel and other persons interested in the case of United States  $v.\ Hamdan:$ 

#### Counsel:

- 1. I have reviewed the Defense Special Request for Relief Request for Continuance of the 12 March hearing until 28 April, and the Government's email response indicating no objection. The requested continuance does not impact the trial date, but merely gives the parties additional time to prepare for the litigation of fact motions.
- 2. I find that granting this request serves the interests of justice and that this continuance does not interfere with the best interest of either the public or the accused in providing a prompt trial for the accused as contemplated in R.M.C. 707(b)(4)(E).
- 3. The Request for Continuance of the 12 March hearing is GRANTED and extends until 28 April 2008. All counsel are directed to make all necessary arrangements to be present in the GTMO Courtroom at 1300 on 28 April 2008 for this session.
- 4. The previous Trial Schedule deadlines are modified as follows:

28 March 2008: Evidentiary motions and associated witness requests due

- 11 April 2008: Responses to motions and to witness requests due
- 18 April 2008: Replies and motions to compel production of witnesses due.
- 5. In granting this request, the Commission has accepted Defense Counsel's uncontradicted assertion that witness production issues will be resolved among the parties without the intervention of the Commission, either by a Government grant of the request, or some other accommodation. If an issue regarding witness production arises, the parties have agreed to file their motions and have the issue resolved without oral argument. The Defense has previously indicated that it accepts responsibility for the delay to our current trial date of 28 May, and this continuance does not impact that allocation.

Keith J. Allred Captain, JAGC, U.S. Navy Senior Military Judge

Schneider, Harry (Perkins Coie) From: Sent: Friday, February 15, 2008 12:23 PM To: Allred, Keith J CAPT NAVMARTRIJUDCIR SW, CMJ; Prasow, Andrea, Ms, DoD OGC; Bley, Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC: Cc: ; David, Steven, COL, DoD OGC; OGC; oD OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD DoD OGC Subject: RE: U.S. v. Hamdan - Request for R.M.C. 802 Conference re D021 The Defense obviously will make ourselves available at your suggested time below. We will await the conference call information. ----Original Message----From: Allred, Keith J CAPT NAVMARTRIJUDCIR SW, CMJ Sent: Friday, February 15, 2008 9 OGC; Schneider, Harry (Perkins Coie); Stone, Tim; Trivett, Clayton G; Wilkins, Donna, Ms, DoD OGC Subject: RE: U.S. v. Hamdan - Request for R.M.C. 802 Conference re D021 I am available for an 802 for the next two and a half hours. I think Mike Chappell can set up a Conference call. How about 11am PST/ 1400 EST? Mike? KJA ----Original Message----From: Prasow, Andrea, Ms, DoD OGC Sent To: OGC

COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim; Trivett, Clayton G; Wilkins, Donna, Ms, DoD OGC

Subject: U.S. v. Hamdan - Request for R.M.C. 802 Conference re D021

LTC ,

The Defense requests a telephonic R.M.C. 802 session as soon as possible to discuss D021 Defense Special Request for Relief (Continuance), in light of the fact that D021 is

unopposed.

Respectfully submitted, AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Commissions

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

From: Britt, William, LTC, DoD OGC

**Sent:** Friday, February 15, 2008 11:41 AM

To: Prasow, Andrea, Ms, DoD OGC;

**Cc:** Berrigan, Michael, Mr, DoD OGC;

GC; David,

Steven, COL, DoD OGC; Gibbs, Rudolph, TSGT, DoD OGC;

, DoD OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC;

Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; Murphy, John, Mr, DoD OGC; Schneider, Harry

(Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC;

DoD OGC

Subject: RE: U.S. v. Haman - Special Request for Relief - Request for Continuance

Sir/ALCON - The Government is not opposed to any reasonable continuance to permit the defense to fulfill the requirements set forth in their Request for Continuance provided that the Request does not cause the Court to concurrently set a new trial date. Thank you.

#### **WILLIAM B. BRITT**

LTC, JA
Deputy Chief Prosecutor
OFFICE OF MILITARY COMMISSIONS

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From: Prasow, Andrea, Ms, DoD OGC

Sent: Wednesday, February 13, 2008 4:27 PM

To:

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC;

DoD OGC; David, Steven, COL, DoD OGC;

; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Subject: U.S. v. Haman - Special Request for Relief - Request for Continuance

LTC ,

Please accept for filing in the case of *United States v. Hamdan* the Defense Request for Continuance of March hearing.

Respectfully submitted,

AJP

Andrea J. Prasow Office of the Chief Defense Counsel Office of Military Commissions



#### February 13, 2008

The Defense requests to revise its earlier request for a continuance and schedule for motions on evidentiary issues as follows: The Defense requests that evidentiary and other motions hearings currently scheduled for March 12, 2008 be continued until April 28, 2008.

The Defense submits that such a continuance is both in the interest of justice and judicial economy. In its proposed schedule for trial of December 19, 2007, the Defense proposed the date of March 10, 2008, to both facilitate the pre-existing schedules of counsel and to allow sufficient time in advance of trial to resolve issues regarding the production of witnesses sufficiently in advance of trial so as to avoid delay of proceedings. Based on discussions with trial counsel, the Defense now anticipates that the issues of witness production, or in the alternative deposition testimony, will be able to be resolved by the parties without the need for judicial ruling. Moreover in the event that witness issues cannot be resolved by the parties the Defense submits that issues of witness production may and should be resolved on the basis of written motions of the parties without oral argument. Accordingly, in the event that the defense is denied a witness, the Defense is prepared to stand on its written motions for production and waive oral argument regarding production. Because of the varying time requirements for the production of witnesses, the Defense will submit such requests and, if necessary, motions for production in accordance with the Military Judge's earlier orders. Accordingly delaying the evidentiary hearing until April 28, 2008, will not require a delay in the start of trial, and it will facilitate Mr. Hamdan's ability to prepare his defense.

Further, the Defense submits that based on trial counsel's assertion in its reply that the government is not in a position to either assert the names of the government's witnesses for trial or assert what evidence if any that it will seek to introduce under MCRE 803 until April 25, 2008, combined with the fact that discovery and consequently the Defense pre-trial investigation is not yet complete, make the need for a second hearing regarding evidentiary matters an almost a foregone conclusion if the evidentiary hearing is held on March 12, 2008, as scheduled.

The Defense believes that neither judicial economy nor the interests of justice are served by having two evidentiary hearings where a single hearing can resolve all pre-trial evidentiary issues. As the court is aware, civilian counsel on this case are all pro bono and bear individually their travel costs and opportunity costs. While this factor should not be overriding in deciding the trial schedule, it is not in the interest of justice to needlessly increase the costs of pro-bono representation by holding two hearings where a single hearing could equally deal with the issues at hand without delaying the commencement of trial.

Finally, delay of the proceedings would facilitate the attendance of military defense counsel at the national death penalty training seminar "Life in the Balance." Based on discussions with the Chief Defense Counsel, and given the current staffing levels in the office of the Chief Defense Counsel, both LCDR Mizer and Ms. Prasow expect to be

detailed in some capacity in the coming days to the defense of the six high value detainees for whom charges were preferred on February 11, 2008. Neither LCDR Mizer nor Ms. Prasow has previously received training in the defense of capital crimes. As such, it is again in the interest of justice to permit military counsel to receive training to better fulfill their duties, where as is the case here, the rescheduling of the hearing will not affect the scheduled start of trial on the merits.

In conjunction with this continuance the Defense proposes the following motions schedule: Evidentiary motions to suppress evidence due March 28, 2008, Government answers due April 11, Defense replies due April 18, 2007. In requesting extended time for briefing the defense notes that admission of evidence concerning Mr. Hamdan's alleged statements in conjunction with investigation of the crimes now alleged against him present issues of first impression and as such warrant additional time for both briefing by the Defense and the Prosecution.

Prof. Charles Swift Lead Defense Counsel

#### UNITED STATES OF AMERICA

v.

## PROSECUTION MOTION TO PRE-ADMIT THE DOCUMENTARY MOTION PICTURE

## THE AL QAIDA PLAN

15 February 2008

## SALIM AHMED HAMDAN a/k/a Saqr al Jaddawi a/k/a/ Khalid bin Abdalla

- 1. <u>Timeliness:</u> This motion is filed within the timeline established by the Military Judge's scheduling order for evidentiary motions.
- **2.** Relief Requested: The Government respectfully requests that *The al Qaida Plan* be pre-admitted into evidence.
- 3. Overview: There is compelling historical precedent for admitting motion pictures as evidence at war crime tribunals. The al Qaida Plan is composed of authentic Al-Qaida and mujahideen propaganda tapes, and other open source material, documenting the history and development of the al-Qaida terrorist network and its declared war against the United States. The al Qaida Plan presentation dates from just prior to al-Qaida's inception to the events of September 11, 2001, and focuses primarily on the history, development, structure, and evolution of al Qaida as a terrorist organization engaged in hostilities against the United States. The al Qaida Plan was modeled after The Nazi Plan, a four-hour documentary motion picture composed using only original Nazi film materials of captured German film, which was admitted into evidence at the International Military Tribunal at Nuremberg (IMT). The Al Qaida Plan seeks to capture the history and purpose of Al Qaida in the words of Al Qaida leaders and spokesmen themselves, and is relevant to legal issues pending before this military commission. Specifically, The al Qaida Plan is evidence of:
  - 1- The existence of an armed conflict<sup>1</sup> between al Qaida and the United States

<sup>&</sup>lt;sup>1</sup> Under International law, an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups, or between such groups within the states.... International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paragraph 67, International Criminal Tribunal for the Former Yugoslavia, 2 October 1995 (Cassese, J). This definition has become the generally accepted definition of armed conflict in international law. See Rome Statute of the International Criminal Court, Article 8.2(f); See also Prosecutor v Kunarac, Judgment, paragraph 56, International Criminal Tribunal for the Former Yugoslavia, 12 June 2002.

- 2- Al Qaida employing tactics which violate the Law of War.
- 3- The existence of a Conspiracy to attack United States civilians, to attack civilian objects protected under International Law, to commit murder in violation of the law of war, and to commit acts of terrorism;
- 4- That al Qaida is an International Terrorist Organization engaged in hostilities against the United States (a required element to be proven for the Offense of Providing Material Support for Terrorism). See Military Commissions Act of 2006, §950v (b)(25)(A).
- 4. <u>Burden and Persuasion:</u> The prosecution has the burden to establish that *The al Qaida Plan* has probative value for it to be admitted into evidence in this military commission. <u>See M.C.A.</u> §949a(2). Evidence has "probative value" if it tends to prove a fact in issue. BLACKS LAW DICTIONARY 1203 6<sup>th</sup> ed. (1991).
- 5. Facts: Attached Evidence in support of this motion
  - A. Documentary Motion Picture *The al Qaida Plan* (Bates Stamp #AQPL-000001)
  - B. Affidavit of Evan Kohlmann regarding the production of *The al Qaida Plan* (found on the same DVD as *The al Qaida Plan*) (Bates Stamp # AQPL-000001)
  - C. Footnoted Motion Picture Script/Expert Report to *The al Qaida Plan* (detailing the narration, and the sourcing of the narration, of "The al Qaida Plan.") (Bates Stamp #AQPL-000002)
  - D. Mr. Evan Kohlmann's *Curriculum Vitae* (detailing Mr. Kohlmann's qualifications and cases to which he has consulted and/or testified as an expert witness) (Bates Stamp #AQPK-001794)
  - E. Documentary Motion Picture *The Nazi Plan Part 1* (Bates Stamp #AQPK-002136)
  - F. Documentary Motion Picture *The Nazi Plan Part 2* (Bates Stamp #AQPK-002137)
  - G. Transcript of Nuremberg Trial Proceedings, Seventeenth Day, 11 December 1945.
  - H. "Nazi Conspiracy and Aggression" Volume V Library of Congress Catalog Number 96-79659

- I. Documentary Motion Picture *Japan in Time of Emergency* (Bates Stamp #AQPK-002138)
- J. *Nazi Concentration Camps* (entered into evidence at the IMT at Nuremberg) (Bates Stamp #AQPK-002140)
- K. *The Nuremberg Trials*, PBS American Experience Series (Bates Stamp #AQPK-002141)
- L. The Anatomy of the Nuremberg Trial- A Personal Memoir Telford Taylor, 1992. (selected pages).
- M. "Art of Justice: The Filmmakers at Nuremberg" Philip Kennicott, Washington Post, November 29, 2005.

### 6. Law and Argument:

- a. The prosecution requests to pre-admit the Prosecution Exhibit for Identification, which is a documentary motion picture entitled "The al Qaida Plan," produced and narrated by Mr. Evan Kohlmann. Mr. Kohlmann's affidavit, which details his professional qualifications, outlines the nature of the "The al Qaida Plan," and verifies the authenticity of the source materials, is attached in support of the prosecution request.
- b. The referenced documentary; *The al Qaida Plan* is admissible pursuant to the Military Commissions Act of 2006 ("MCA"). The MCA states "evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person." <u>See M.C.A.</u> §949a(2). Evidence has "probative value" if it tends to prove a fact in issue. BLACKS LAW DICTIONARY 1203 6<sup>th</sup> ed. (1991).
- c. Since its inception in the late 1980s, Al-Qaida and its various components have relied on multimedia propaganda to spread their message and recruit new members around the world. The al Qaida Plan contains excerpts from the many propaganda films and interviews released by Usama bin Laden and al Qaida during the last sixteen years. To the greatest extent possible, this presentation seeks to capture the history and purpose of Al Qaida in the words of Al-Qaida leaders and spokesmen themselves. In order to boost the confidence of its supporters and detractors, Al-Qaida has documented, in precise detail, the conception, planning, and even execution of terrorist attacks aimed at American targets. Additionally, Al-Qaida's media releases consistently emphasize the nature and significance of its global war against the United States. The existence of the war between the United States and al Qaida, and the reasons al Qaida decided to initiate the war, are best told through al Qaida's members, supporters and spokesmen.
- d. Al Qaida and the United States are at war, and the nature of this war and the tactics being employed by al Qaida and its affiliates constitute various violations of the Law of Armed Conflict. There is no question regarding the probative value of "The al Qaida"

Plan," and its relevancy to certain legal issues pending before this military commission. Specifically, *The al Qaida Plan* establishes:

- 1- The existence of armed conflict<sup>2</sup> between al Qaida and the United States<sup>3</sup>
- 2-Al Qaida employs tactics which violate the Law of War.
- 3-The existence of a conspiracy<sup>4</sup> to attack United States civilians, to attack civilian objects protected under International Law, to commit murder in violation of the law of war and to commit acts of terrorism:
- 4- That al Qaida is an International Terrorist Organization engaged in hostilities against the United States (a required element to be proven for the Offense of Providing Material Support for Terrorism). See MCA §950v (b)(25)(A).

#### Structure and Organization of the motion picture documentary The al Qaida Plan

- a. The al Qaida Plan was produced from authentic Al-Qaida and mujahideen propaganda tapes and other open source material, documenting the history and development of the al-Qaida terrorist network and its declared war against the United States. The presentation dates from just prior to al-Qaida's inception to the events of September 11, 2001. (Kohlmann, Aff. ¶ 2).
- b. *The al Qaida Plan* focuses primarily on the history, development, structure, and evolution of al Qaida as a terrorist organization from 1989-2001. It is comprised of seven different parts:

<sup>&</sup>lt;sup>2</sup> Under International law, an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups, or between such groups within the states.... International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paragraph 67, International Criminal Tribunal for the Former Yugoslavia, 2 October 1995 (Cassese, J). This definition has become the generally accepted definition of armed conflict in international law. See Rome Statute of the International Criminal Court, Article 8.2(f); See also Prosecutor v Kunarac, Judgment, paragraph 56, International Criminal Tribunal for the Former Yugoslavia, 12 June 2002.

<sup>&</sup>lt;sup>3</sup> The Offense of Providing Material Support for Terrorism requires proof that the accused provided material support or resources to an international terrorist organization *engaged in hostilities against the United States*. See M.C.A. §950v (b)(25)(A).

<sup>&</sup>lt;sup>4</sup>Many of the statements made by members and associates of al Qaida in these videos constitute "Statements made in course and furtherance of a Conspiracy by a co-conspirator," are not hearsay, and would be admissible in Military Courts Martial and federal district courts of the United States. See M.R.E 801 (d)(2)(E); F.R.E 801(d)(2)(E).

- i. Part One of the presentation details the Soviet-Afghan War from 1979 until 1989. Although this period pre-dates the creation of al Qaida, al Qaida was an off-spring of infrastructure put in place by Abdullah Azzam, Usama bin Laden, Ayman al Zawahiri, and others taking part in the Soviet-Afghan War. The foundation and ideology of al Qaida was formed during this period and places al Qaida in a proper historical context.
- ii. Part Two details al Qaida's early days in the Sudan, from 1989 to 1996, when al Qaida first spread the message to its membership that the United States was its principal enemy.
- iii. Part Three details the period in time for 1996 to 1998 when al Qaida moved from the Sudan to Afghanistan. During this period, al Qaida, Usama bin Laden, as the emir of al Qaida, publicly declared war<sup>5</sup> against America for its continued presence in Saudi Arabia and its support of Israel. In February of 1998, Usama bin Laden declared that American civilians were justified targets in this war and should be killed anywhere in the world they could be found.
- iv. Part Four deals with military training camps established and or funded by al Qaida in Afghanistan. This part of the presentation is probative in that al Qaida functioned and trained as a military force (albeit an unlawful one) with military style training for its recruits. The ideology imparted to the trainees focused on targeting Americans and Israelis. Later parts of the presentation detail As Sahab Productions (al Qaida's official media wing) showing certain 9/11 hijackers training at these camps. This evidence is probative as it helps to establish al Qaida's responsibility for the September 11 attacks.
- v. Part Five of the presentation focuses primarily on the East Africa Embassy Bombings in Kenya and Tanzania in August of 1998, just months after Usama bin Laden proclaimed that American civilians were legitimate targets and should be killed. The presentation contains video recording the aftermath of the two attacks entered into evidence in the East Africa Embassy bombings trial in the District Court for the Southern District of New York. These videos are probative to the issue as to whether this al Qaida attack on the U.S. embassies were of a sufficient nature and intensity to constitute an armed attack that would trigger the laws of armed conflict. The reference to the federal court trial and convictions of individuals, some of whom admitted that it was an al Qaida

<sup>&</sup>lt;sup>5</sup> The laws of war apply in all cases of declared war or armed conflict, even if the state of war is not recognized by one of the parties. See Geneva Convention I, Art. II (1949). Using this principle the focus of inquiry in determining the existence of an armed conflict is the intent of the attacker – al Qaida – rather than the United States. Usama bin Laden's Declaration of War, therefore, triggered the application of the Law of War from the time of his Declaration (August 1996) to the present.

operation, is not only probative to establish that al Qaida was responsible for the attacks, but also as proof that a conspiracy existed to attack United States civilians, to attack civilian objects, to commit murder in violation of the law of war, and to commit acts of terrorism. It also constitutes probative evidence to establish that al Qaida is an "international terrorist organization engaged in hostilities against the United States;" a required element of proof of the charged offense of "Providing Material Support for Terrorism."

vi. Part Six of the presentation focuses on the attack against the *U.S.S. Cole*, an attack that killed 17 United States sailors and injured 39 others. This section of the presentation also helps to establish that al Qaida was responsible for the attacks, establishes proof that a conspiracy existed to commit murder in violation of the law of war and to commit acts of terrorism. It, too, is probative of the issue of establishing al Qaida is an "international terrorist organization engaged in hostilities against the United States;" a required element of proof of the substantive offense of "Providing Material Support for Terrorism." The fact that Yemen has tried and convicted six individuals for the attack is probative (if not determinative) to the issue as to who was responsible for the attack, as is the fact that the two individuals who were indicted in the District Court for the Southern District of New York for their role in the attacks gave statements to the FBI indicating they had trained at al Qaida camps in Afghanistan.

vii. Part Seven of the presentation primarily examines the attacks upon the United States on September 11<sup>th</sup> 2001, including visual proof of the attacks themselves, the amount of destruction the attacks caused to the World Trade Center, the Pentagon and in Shanksville, Pennsylvania, as well as the civilian nature of the World Trade Center and the airliners used during the attacks. It also details al Qaida's propaganda releases in which al Qaida and its leaders take credit for the attacks of September 11<sup>th</sup> and vow further attacks. Like the sections on the East Africa Embassy bombings and the attack on the U.S.S. Cole, this evidence is also probative to establish that al Qaida was responsible for the attacks, establishes proof that a conspiracy existed to attack United States civilians, to attack civilian objects, commit murder in violation of the law of war, and to commit acts of terrorism. Part Seven, like the sections on the East Africa Embassy Bombings and the attacks on the U.S.S. Cole is also probative evidence establishing al Qaida as an "international terrorist organization engaged in hostilities against the United States;" a required element of proof of the substantive offense of "Providing Material Support for Terrorism."

## Historical Precedent for Admitting Motion Picture as Evidence in War Crimes Tribunals

- a. There is compelling historical precedent for admitting motion pictures as evidence at war crime tribunals. Following World War II, motion pictures were presented as evidence in the International Military Tribunal for the Trial of the Major War Criminals at Nuremberg<sup>6</sup> and at the International Military Tribunals for the Far East. Nazi Concentration Camps and The Nazi Plan were both admitted as evidence at the International Military Tribunal for the Trial of the Major War Criminals at Nuremberg, Germany. Japan in Time of Emergency was introduced as evidence at the International Military Tribunals for the Far East<sup>7</sup>.
- b. The Nazi Plan is a four-hour documentary motion picture composed using only original Nazi film materials of captured German film. Its assemblage was done chronologically in four parts, spanning 23 years: The rise of the NSDAP (1921-1933); Acquiring Totalitarian Control of Germany (1933-1935); Preparation for Wars of Aggression (1936-1939); Wars of Aggression (1939-1944)8. The Nazi Plan incorporated excerpts from Leni Riefenstahl's Nazi Propaganda film entitled Triumph of the Will<sup>10</sup>
- c. The Nazi Plan was assembled by Budd Schulberg, an Army soldier and writer who would later go on to win an Oscar for "On the Waterfront." Between June 1945 and the opening of the Trial Against the Major War Criminals on Nov 21, Mr. Schulberg and his team went through more than 10 million feet of film, and would fly regularly from Berlin, where they set up a studio, to Nuremberg, where they coordinated their material with the prosecutors preparing the U.S. part of the Allied Legal case. Justice Jackson, the Chief Prosecutor for the United States at the IMT, was involved in approving the final script. 12
- d. Nazi Concentration Camps is a narrated film "compiled from motion pictures taken as the Allied armies in the West liberated the areas in which these camps were located. 13,

<sup>&</sup>lt;sup>6</sup> Other shorter films were also shown documenting atrocities in the east, and a pogrom in a Jewish ghetto. See Lawrence Douglas, Film as Witness: Screening 'Nazi Concentration Camps' before the Nuremberg Tribunal. 105 Yale L.J. 449, Ft nt 67 (1995).

<sup>&</sup>lt;sup>7</sup> See U.S. National Archives Record Group 238: Collection of World War II War Crimes Records <sup>8</sup> See "Nazi Conspiracy and Aggression" Volume V, Office of United States Chief Counsel for prosecution of Axis Criminality-A Collection of Documentary Evidence and Guide Materials Prepared by the American and British Prosecuting Staffs for Presentation before the International Military Tribunal at Nurnberg, Germany (Attachment H).

<sup>&</sup>lt;sup>9</sup> Leni Riefenstahl was the legendary director and propagandist for Hitler who was commissioned by Hitler to create The Triumph of the Will. See "Art of Justice: The Filmmakers at Nuremberg" by Philip Kennicott, Washington Post, November 29, 2005.

<sup>&</sup>lt;sup>10</sup> See The Anatomy of the Nuremberg Trial- A Personal Memoir pg 20, Telford Taylor, 1992. (Telford Taylor was one of the prosecuting staff at Nuremberg) (Attachment L).

<sup>11</sup> See generally "Art of Justice: The Filmmakers at Nuremberg" by Philip Kennicott.
12 See id.

<sup>13</sup> See Lawrence Douglas, Film as Witness: Screening 'Nazi Concentration Camps' before the Nuremberg Tribunal. 105 Yale L.J. 449, 454 (1995).

The narration used in *Nazi Concentration Camps* was taken directly from the reports of the military photographers who filmed the camps <sup>14</sup>.

e. *Japan in Time of Emergency* was used in the International Military Tribunals for the Far East and was originally released in 1933 by the Japanese War ministry and the Osaka Mainichi Newspaper Publishing Company. This film praises the military and spiritual strength of the Japanese People and warns against Western penetration of Japanese society. The film reviews the modern history of Japan, including its invasion of China.<sup>15</sup>

## Comparison of The al Qaida Plan to World War II War Crime Tribunals Movie Evidence

- a. The content of *The al Qaida Plan* compares favorably to World War II war crime tribunals' motion picture evidence, as *The al Qaida Plan* was designed and produced based on the format that was used in *The Nazi Plan*. The evidentiary rules of those tribunals and the evidentiary standards governing the current military commissions are nearly identical. These comparisons establish the admissibility of *The al Qaida Plan* in this military commission.
- b. On 11 December 1945, Commander James Donavan, Assistant Trial Counsel for the United States at the International Military Tribunal for the Trial of the Major War Criminals, offered Document Number 3054-PS, United States Exhibit Number 167, the motion picture entitled "The Nazi Plan." Commander Donavan offered the following explanation of the evidence to the tribunal, on the record, which was the decider of both law and fact:

In the past 3 weeks the prosecution has presented to this Tribunal a vast amount of evidence concerning the nature of the Nazi conspiracy and what we contend to be its deliberate planning, launching and waging of wars of aggression. That evidence has consisted of documentary and some oral proof, but the Nazi conspirators did more than leave behind such normal types of evidence. German proficiency in photography has been traditional. Its use as a propaganda instrument was especially well known to these defendants, and as a result the United States in 1945 captured an almost complete chronicle of the rise and fall of National Socialism as documented in films by the Nazis themselves. It is from excerpts of this chronicle that we have compiled the motion picture now presented, entitled "The Nazi Plan," which in broad outline sums up the case thus far presented under Counts One and Two of the Indictment.

<sup>&</sup>lt;sup>14</sup> See Nazi Concentration Camps (Bates Stamp AQPK-002136 and 002137)

<sup>&</sup>lt;sup>15</sup> This statement is taken directly from the U.S. National Archives, Record Group 238: Collection of World War II War Crimes Records.

The motion picture has been divided into four parts. This morning we first offer to the Tribunal Parts 1 and 2 respectively entitled "The Rise of the NSDAP, 1921-1933," and "Acquiring Totalitarian Control of Germany, 1933-1935." ...At 11:30 we shall present Part 3, entitled "Preparation for Wars of Aggression, 1935-1939."...At 2 P.M. we will offer Part 4, Wars of Aggression, 1939 to 1944."...

Parts 1 and 2 now to be presented, enable us to re-live those years in which the Nazis fought for and obtained the power to rule all life in Germany. We see the early days of terrorism and propaganda bearing final fruit in Hitler's accession to the Chancellery in 1933, then the consolidation of power within Germany, climaxed by the Parteitag of 1934, in which the Nazis proclaimed to the nation their plans for totalitarian control. It is in simple and dramatic form the story of how a nation forsook its liberty.

I wish again to emphasize that all film now presented to the Tribunal, including, for example, pictures of early Nazi newspapers, is the original German film, to which we have added only the titles in English

...In part 3 of our documentary motion picture...we see the use they made of that power and how the German nation was led by militaristic regimentation to prepare for aggressive war as an instrument of national policy. Part 3, "Preparation for Wars of aggression, 1935-1939; 1935-Von Schirach urges Hitler Youth to follow principles of "Mein Kampf."

<u>See</u> Transcript of Nuremberg Trial Proceedings, Seventeenth Day, 11 December 1945, pg 400-401 (Attachment G).

c. The al Qaida Plan was assembled and narrated by Evan Kohlmann, the President and Founder of Globalterroralert.com. See Evan Kohlmann affidavit ¶1. Evan Kohlmann founded Globalterroralert.com for the purpose of providing English translations of terrorist communiqués and excerpts of mujahideen videos free to the general public for educational and academic purposes. Since 1997, Evan Kohlmann has researched and collected vast amounts of raw data concerning international terrorist organizations and, during this time, has amassed one of the world's largest private collections of original communiqués, books, audio recordings, and video recordings from these entities. Evan Kohlmann contracted with the Office of Military Commissions, Office of the Chief Prosecutor to prepare a video presentation, from authentic Al-Qaida and mujahideen propaganda tapes and other open source material, documenting the history and

development of the Al-Qaida terrorist network and its declared war against the United States.

- d. Both *The Nazi Plan* and *The al Qaida Plan* rely on original footage of the enemy, as well as English subtitling added by the editors assembling the film. In *The al Qaida Plan*, Evan Kohlmann re-cast the subtitles, in the color white for ease of viewing where English subtitles were not provided by As-Sahab, or where the yellow subtitles proved difficult to read. Other titles and written explanations were added by Evan Kohlmann for purposes of clarity. The adding of the subtitles titles and written explanations to the video is substantively similar to the commentary given by Commander Donavan, on the record at the IMT, regarding the nature of *The Nazi Plan*.
- e. Both *The Nazi Plan* and *The al Qaida Plan* also include sections that pre-date armed conflict, which provides historical context for the two groups. While *The Nazi Plan* details a twelve year period chronicling the rise of the National Socialist German Worker's Party (NSDAP) prior to the party acquiring control of Germany, the al Qaida Plan details a ten year period during the Soviet-Afghan War where al Qaida's future leaders, in what they termed the "Afghan jihad," laid the foundation for the creation of al Qaida. Both motion pictures span a time period of roughly 23 years.
- f. As noted, there are substantial similarities between *The Nazi Plan* and *The al Qaida Plan*. The differences between the two are minimal. For example, *The al Qaida Plan* relies on narration from Evan Kohlmann to introduce different pieces of video evidence, results of certain court proceedings and open source footage not generated by al Qaida, whereas *The Nazi Plan* has no voice narration. Admittedly, the narration by Evan Kohlmann is testimonial in nature. However, *The Nazi Plan* also included similar introductory testimony on the record, if not in the film, from Commander James Donavan, who was actually one of the prosecutors for the United States.
- g. The written document titled "Nazi Conspiracy and Aggression," is described as "A Collection of Documentary Evidence and Guide Materials Prepared by the American and British Prosecuting Staffs for Presentation before the International Military Tribunal." The "Nazi Conspiracy and Aggression," contains the written dialogue of Nazi Party members appearing on the film, as well as dates of the speeches, identities of different members of the Nazi Party, summaries of what is being said by people identified by the prosecution staff, and descriptions of some of the action taking place on the screen. These additions were prepared and presented as "guide materials" by the prosecution and are also testimonial in nature. These guide materials were not subject to cross-examination by the defense.
- h. Evan Kohlmann's narrative style is nearly identical to the testimony in the guide materials for *The Nazi Plan* and differs only in that it is placed in the presentation itself as opposed to a written guide. Mr. Kohlmann will be subject to cross-examination as required on relevant issues arising from his presentation negating concerns about hearsay

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<sup>&</sup>lt;sup>16</sup> See "Nazi Conspiracy and Aggression" Volume V Library of Congress Catalog Number 96-79659 (Attachment H)

in his narration. It is important to note that "Nazi Concentration Camps" also provided narration taken from military reports, which did not prevent the film's admission into evidence.

- i. Other than identifying certain individuals, places, results of criminal trials, and open source material, Evan Kohlmann's presentation does not contain his opinions or conclusions other than the authenticity of the footage. His narration identifies video footage released by al Qaida of its leaders and their training camps, excerpts from their written and oral statements and manifestos, time periods certain tapes were released, public results of criminal trials and the content of statements made by those convicted or accused of the crimes. Furthermore, almost all of the open source facts and data relied upon is of a type reasonably relied upon experts in his field and not subject to reasonable dispute.
- j. Some of the information Evan Kohlmann relied upon is located in federal court transcripts or in the Final Report of the National Commission on Terrorist Attacks Upon the United States (The 9/11 Commission Report). The 9/11 Commission was a bipartisan Congressional and Presidential Commission with the legal mandate "to investigate the facts and circumstances relating to the terrorist attacks of September 11, 2001." The Commission reviewed 2.5 million pages of documents, interviewed more than 1,200 individuals in 10 different countries, held 19 days of public hearings and took public testimony from 160 witnesses. 17 Court transcripts and the 9/11 Commission Report 18 are the types of facts and data reasonably relied upon by experts in terrorism. In the field of terrorism the reliability of this information is even greater than typical fields of study because much of the information is generated through the legal processes of the United States government. Furthermore, the fact that individuals were tried and convicted in certain cases in United States federal court, and for the attack on the U.S.S Cole in Yemen, is also a matter of public record and not subject to reasonable dispute. Evan Kohlmann merely indicates that certain individuals were found guilty in various courts of law.

<sup>&</sup>lt;sup>17</sup> See <a href="http://www.9-11commission.gov/">http://www.9-11commission.gov/</a>. This web site was frozen on September 20, 2004 at 12:00 AM, EDT. It is now a Federal record managed by the National Archives and Records Administration.

<sup>&</sup>lt;sup>18</sup> Article 21 of Nuremberg Charter stated that "The Tribunal... shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and of records and findings of military or other Tribunals of any of the United Nations. While the Military Commission Act has no such mandate, the nearly identical evidentiary standards of this military commission and that of the IMT would permit the admission of the 9/11 Report into evidence as a self-authenticating governmental report.

## Comparison of the evidentiary standard of the World War II war crime tribunals and this military commission

a. The evidentiary standards mandated for the International Military Tribunal for the Trial of the Major War Criminals and the International Military Tribunal for the Far East are nearly identical to those of the current military commissions. The evidentiary standard for the International Military Tribunal for the Major War Criminals is as follows: 19

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to be of *probative* value.

b. The evidentiary standard set out in Article 13 of the International Military Tribunal for the Far East is nearly identical with the exception of specific guidance concerning the accused's admissions or statements.<sup>20</sup>:

Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible. (Emphasis added)

c. As previously stated, this military commission is governed by the Military Commissions Act of 2006, which states "evidence shall be admissible if the military judge determines that the evidence would have *probative value* to a reasonable person.<sup>21</sup>" The "probative value" evidentiary standard of the International Military Tribunals following World War II and this military commission are nearly identical.

There is a sufficient basis to find that the source video and other open-source materials used in *The al Qaida Plan* is what it purports to be.

a. Once evidence is determined to have probative value it shall be admitted if the military judge makes a determination that there is a sufficient basis that the evidence is what it is claimed to be. See M.C.A. 949a(2)(D).

"Evidence shall be admitted as authentic so long as the military judge of the military commission determines that there is a sufficient basis to find that the evidence is what it

<sup>21</sup> See M.C.A. §949a(2). (Emphasis added).

<sup>&</sup>lt;sup>19</sup> See London Agreement, Aug. 8, 1945, sec v, art 19, reprinted in 1 IMT, Supra note 2, at 15 (emphasis added)

<sup>&</sup>lt;sup>20</sup> See Charter for the International Military Tribunal for the Far East, Article 13

is claimed to be and that the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given the evidence."<sup>22</sup>

b. For the following reasons, there is a sufficient basis to find that the source video and other materials used in *The al Qaida Plan* is what it purports to be. In the creation of *The* al Qaida Plan Mr. Kohlmann has sworn and attested that he primarily used original video footage provided directly by Al-Qaida and its affiliates through password-protected Internet websites and extremist bookstores based in Europe. Many of the videos used in the presentation were produced by the As-Sahab Media Foundation, which Evan Kohlmann attests has served as Al-Qaida's official multi-media propaganda office since the release, in early 2001, of its first doctrinal film, The Destruction of the U.S.S. Cole<sup>23</sup>. According to Evan Kohlmann's affidavit, the other videos produced by As-Sahab and excerpted in The al Qaida Plan: include the following titles released by al Qaida:

- a. The Wills of the Martyrs of New York and Washington,
- b. Knowledge is For Acting Upon,
- c. The Will of Abdelaziz al-Omari,
- d. Several unnamed recordings of Al-Qaida leaders Usama Bin Laden and Ayman al-Zawahiri.
- c. Evan Kohlmann produced "The Rise of al Qaida" solely utilizing digital video footage that he personally obtained. He has attested that the source films are recognized by the trademark As-Sahab logo located at the bottom left of the viewing screen. Mr. Kohlmann, through his role as President of Globalterroralert.com and his expertise in terrorist groups and their propaganda efforts on the internet, has sufficient experience to establish the authenticity of the source video.
- d. Evan Kohlmann has been qualified as an expert in various aspects of international terrorism in multiple federal jurisdictions—including the U.S. District Court for the Southern District of New York and the U.S. District Court for the Eastern District of Virginia—and has testified as an expert witness before numerous criminal tribunals in the United States, the United Kingdom, and Bosnia-Herzegovina.. He has been qualified as an expert and testified in the following criminal cases: United States v. Sabri Benkhala (Eastern District of Virginia, 2004), United States v. Ali Timimi (Eastern District of Virginia, 2005), United States v. Uzair Paracha (Southern District of New York, 2005), United States v. Ali Asad Chandia (Eastern District of Virginia, 2006), United States v. Yassin Aref (Northern District of New York, 2006), United States v. Rafiq Sabir (Southern District of New York, 2007). He has also testified as an expert on behalf of British Crown Prosecutors in Regina v. Mohammed Ajmal Khan and Palvinder Singh (Snaresbrook Crown Court, United Kingdom 2006), Regina v. Samina Malik (Old Bailey, United Kingdom 2007), and Regina v. Hassan Mutegombwa (Old Bailey, United Kingdom 2007). Mr. Kohlmann has also testified as an expert in H.M.A. v Mohammed

<sup>&</sup>lt;sup>22</sup> See M.C.A. §949a.(D)(i)(ii).

<sup>&</sup>lt;sup>23</sup> This As Sahab release is also referred to as State of the Ummah. See Evan Kohlmann Affidavit ¶8

Atif Siddique in the Glasgow High Court of Scotland (2007) and for war crimes investigators in International Prosecutors v. Abduladhim Maktouf (Supreme Court of Bosnia Herzegovina, 2005). No court has ever found Mr. Kohlmann to be unqualified to testify as an expert witness<sup>24</sup>. The defense and this military commission have been provided Evan Kohlmann's *Curriculum Vitae* and transcripts of his testimony in the above cases in the United States and Bosnia.

- e. Mr. Kohlmann also currently works as a consultant at the behest of the United States, British, and Australian governments, as well as private clients, to provide expert advice and assistance with regard to the training, indoctrination, and recruitment used by terrorist organizations. He has briefed such federal agencies as the National Security Council (NSC), the United States Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the United States Department of Defense (DOD), and the Central Intelligence Agency (CIA) on, among other things, the use of the Internet in al Qaida's propaganda efforts.
- f. Evan Kohlman will state, in his expert opinion, that the source video for *The al Qaida Plan* is authentic. Based on Mr. Kohlmann's qualifications, experience, body of research and collection of works on Globalterroralert.com, there is a sufficient basis to find that *The al Qaida Plan* and its contents are what they are claimed to be. Furthermore, the source video is also "self authenticating" in that it displays al Qaida members that are either wanted, captured or deceased, speaking about their intentions to attack America.

## Admissibility of the Prologue to The al Qaida Plan

g. After producing *The al Qaida Plan*, Evan Kohlmann felt it necessary to add a prologue to describe various technical aspects of the presentation, and to define certain Arabic or Muslim colloquialisms, to aid the viewers in understanding the content, and sources of content, in the presentation. The prologue includes the means to identify the differences between his subtitling and the subtitling provided by As Sahab Productions and helps the commission members identify the source of the video. Mr. Kohlmann's certificate in Islamic Studies from Georgetown University's Prince Al-Waleed bin Talal Center for Muslim Christian Understanding, and his expertise in terrorism, qualifies him to provide such information, which will assist the trier of fact in understanding the evidence. Furthermore, like the substantive part of the presentation, Mr. Kohlmann will be subject to cross-examination on matters included in the prologue.

#### Judicial Economy Weighs Toward Admissibility of The al Qaida Plan

h. The current military commissions differ from typical criminal cases in that they require proof of historical events occurring over a period of nearly sixteen years. Sometimes the government bears the burden of proving certain historical events.

<sup>&</sup>lt;sup>24</sup> Evan Kohlmann was not permitted to testify in the case of the <u>United States v Abu Ali</u> in 2005 due primarily to a late submission by the prosecutors in that case. He never testified as to his qualifications in that case. Evan Kohlmann was qualified as an expert twice in the Eastern District of Virginia subsequent to the ruling in Abu Ali.

Accordingly, the prosecution must decide how to balance the quantum of historical evidence with the specific evidence to prove the accused's participation in the Conspiracy and his material support to a terrorist organization engaged in hostilities against the United States. As Justice Jackson stated before the International Military Tribunal at Nuremberg:

"This tribunal sits under a Charter which recognized the impossibility of covering a decade of time, a continent of space, a million acts, by ordinary rules of proof, and at the same time finishing this case within the lives of living men."<sup>25</sup>

- i. The *al Qaida Plan* took Mr. Kohlmann over 8 months to complete. He reviewed hundreds of hours of videos that spanned over twenty years before choosing those excerpted in the presentation. All of the individual pieces of information contained within the presentation are admissible under the Military Commission Act's "probative value" evidentiary standard, and Mr. Kohlmann's expertise would allow for him to separately authenticate each and every source of information in the presentation. In doing so, he could testify consistently with the narration on the video. The sheer volume of the materials reviewed and used by Mr. Kohlmann in the presentation, as well as the two decade span of time it encompasses, lends itself to this pre-prepared format, subject to live cross-examination by the defense, for judicial economy and clarity of presentation.
- j. As just one example, many of the excerpts in the presentation, such as those from the *Destruction of the U.S.S. Cole*, come from As Sahab releases that are sometimes over two hours long. The prosecution could go through the painstaking and lengthy process of individually authenticating every source video and then publish each excerpt separately. This process could, however, potentially take days, if not weeks, as the government meticulously covered the seventeen year history of the al Qaida conspiracy and its war against the United States. *The al Qaida Plan* is one hour and twenty minutes long and captures the history and purpose of Al Qaida in the very words of Al-Qaida leaders and its spokesmen.
- k. The defense suffers no undue prejudice from the presentation of *The al Qaida Plan*. The defense has been provided with the presentation and the prosecution's notice of intent to use this evidence months<sup>26</sup> before trial. The defense was similarly provided Evan Kohlmann's *Curriculum Vitae*, all of his prior testimony in federal courts and international tribunals, as well as the source videos from which the excerpts were taken, in their entirety. The defense will have an opportunity to cross-examine Mr. Kohlmann on every relevant subject that *The al Qaida Plan* raises, with the added benefit of

<sup>&</sup>lt;sup>25</sup> Lawrence Douglas, Film as Witness: Screening 'Nazi Concentration Camps' before the Nuremberg Tribunal. 105 Yale L.J. 449, 449-481 (1995).

<sup>&</sup>lt;sup>26</sup> To the extent that the discovery of the al Qaida Plan, on 21 December 2007, is deemed to be insufficient notice under MCRE 803, this motion to pre-admit evidence constitutes further notice that the government intends to offer *The al Qaida Plan* into evidence, and that the content of the motion, and the evidence used in support of the motion, establish the general circumstances under which the evidence was obtained. Mr. Kohlmann may be reached at Evan@globalterralert.com.

knowing, months before trial, exactly what a substantial portion of Mr. Kohlmann's testimony consists of.

- l. Through its propaganda, Al Qaida made its intention to attack the United States very clear, both prior to and subsequent to the attacks of September 11<sup>th</sup> 2001. *The al Qaida Plan* proves the nature of al Qaida and its conspiracy to attack America better and more concisely than any other evidence can, because it substantively relies on al Qaida leaders and spokesmen to do so.
- m. The al Qaida Plan has probative value to several issues before this military commission and the underlying source information is authentic. There is strong precedent for using motion picture evidence in war crime tribunals. The nature by which the prosecution seeks to admit The al Qaida Plan presentation is far less prejudicial to the accused than even those accused of war crimes after World War II at the IMT. For the preceding reasons, this Prosecution Exhibit for identification, the documentary motion picture entitled The Al Qaida Plan, should be admitted into evidence before this military commission and the words "for identification" be deleted.
- 7. Request for Oral Argument: If unopposed, the Prosecution is willing to waive oral argument. The Prosecution reserves the right to request oral argument in accordance with R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."
- 8. Request for Witnesses: Mr. Evan Kohlmann will be available to testify.
- **9.** Certificate of Conference: The prosecution conferred with the defense regarding the submission of this motion. Defense reserved the right to comment and respond, until after reading the motion.
- 10. Attachments: The attachments are listed in the Law and Argument section.

11. Submitted by:

William Britt

LTC, JA, USA

Lead Prosecutor

Timothy Stone

LCDR, JAGC, USN

Prosecutor

11511

John Murphy Department of Justice Prosecutor

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Clayton Trivett
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Prosecutor

## Script: "The Al-Qaida Plan"

### Evan F. Kohlmann

## PART I: The Soviet-Afghan War

In December 1979, fearing the collapse of Communism in Central Asia, the former Soviet Union ordered its military to invade the nation of Afghanistan and restore local order. However, anti-communist sentiment spread quickly in Afghanistan, and the Soviets found themselves confronted with a relentless and, at times, ruthless foe: the mujahideen, or Muslim 'holy warriors'. Though the vast majority of the mujahideen were native Afghans, some volunteers for the jihad, or 'holy war', against the Soviet Union came from abroad – from such places as Saudi Arabia, Egypt, Yemen, North Africa, Iraq, Syria, Jordan, the Palestinian territories, and beyond.

When Arab recruits began arriving in Pakistan in 1985 searching for jihad, their new leader became radical Palestinian cleric Dr. Abdullah Azzam. 1 Azzam's personal philosophy was "jihad and the rifle alone: no negotiations, no conferences, and no dialogues." 2 Azzam and his supporters schemed to use the conflict in Afghanistan as a means to create a multi-national Muslim army to wipe out secular regimes across the Middle East, Asia, and North Africa. Azzam's Arab-Afghan movement would also target any regimes that stood in the way of a Sunni Islamic revolution. In April 1988, Abdullah Azzam published his greatest manifesto, titled 'Al-Qaida", meaning "The Base" or "the Solid Foundation." 3 Azzam reasoned that every revolutionary ideology needs a rugged, elite cadre to protect it, inspire it, and lead it to ultimate victory. Only by continued armed struggle—even after the liberation of Afghanistan—would the unified strength of the Muslims be brought to bear on their enemies. In concluding, Azzam issued what he referred to as "the final call": "We shall continue the Jihad no matter how long the way is until the last breath and the last beating of the pulse or we see the Islamic state established." 4

Azzam's most influential followers, most notably millionaire Saudi exile Usama Bin Laden, were already busy in an effort to implement his ideas. Bin Laden provided critical financing and logistical support to Azzam's organization and soon himself became a dominant force among the Arabs fighting in Afghanistan. Bin Laden and Azzam co-founded the Makhtab-e-Khidamat al-Mujahideen, or "Mujahideen Services Office," whose purpose was to record the arrival of new jihadist recruits from abroad and to organize them into loyal and

<sup>&</sup>lt;sup>1</sup> Muhammad, Basil. <u>Al-Ansaru l'Arab fi Afghanistan</u>. The Committee for Islamic Benevolence Publications; ©1991. *Page 112.* 

<sup>&</sup>lt;sup>2</sup> "Sheikh Abdullah Azzam." Azzam Publications; London, UK. http://www.azzam.com/html/storiesabdullahazzam.htm.

<sup>&</sup>lt;sup>3</sup> Azzam, Dr. Abdallah. "Al-Qa`ida." <u>Al-Jihad</u>. No. 41; April 1988. Page 46.

<sup>&</sup>lt;sup>4</sup> Azzam, Dr. Abdallah. "Al-Qa`ida." Al-Jihad. No. 41; April 1988. Page 46.

disciplined military units.<sup>5</sup> On September 10, 1988, Azzam, Bin Laden, and their fellow mujahideen convened the first meeting of Al-Qaida. The leaders of the new Al-Qaida network formed a Shura, or 'Advisory' Council to help manage the group. Shura Council members presided over various sub-committees responsible for carrying out specialized tasks on Al-Qaida's behalf. The Shura Council included Usama Bin Laden, who became the amir, or leader, of the new group; Dr. Ayman al-Zawahiri, founder of the Egyptian Islamic Jihad Movement – a group later named by the U.S. government as a designated foreign terrorist organization<sup>6</sup>; Abu Ubaidah al-Banshiri, a former Egyptian police officer who earned his combat nickname Al-Banshiri while fighting in the Panjsher Valley of Afghanistan<sup>7</sup>; and, Abu Hajer al-Iraqi, a.k.a. Mahmud Mamdouh Salim.<sup>8</sup> Al-Qaida's operations were divided amongst various wings, including a military committee, a security committee, a financial committee, a religious legal committee, a political committee, and a media committee.<sup>9</sup>

### Part II: Al-Qaida in Sudan

On February 15, 1989, the last Soviet troops withdrew from Afghan soil. But instead of celebrating their victory and embracing peace, the mujahideen factions that had together fought the Soviets quickly turned on each other. The infighting also spread to the foreign fighters under the lead of Abdullah Azzam and Usama Bin Laden, who faced growing internal quarrels over the future of the jihad and the proper distribution of money collected to support it. One of the victims of that infighting was Azzam himself, killed along with two of his sons on November 24, 1989 in a mysterious car bomb blast in Peshawar, Pakistan. 10

With Azzam no longer in control, Bin Laden drew closer to Azzam's Egyptian rivals within Al-Qaida's Shura Council—namely Dr. Ayman al-Zawahiri, the leader of the Egyptian Islamic Jihad Movement (otherwise known as the EIJ) and Shaykh Omar Abdel Rahman (also known as the Blind Shaykh), who served

<sup>&</sup>lt;sup>5</sup> "Additional Background Information on Charities Designated Under Executive Order 13224: Makhtab al-Khidamat / Al Kifah." United States Treasury Office of Terrorism and Financial Intelligence (TFI). <a href="http://www.treasury.gov/offices/enforcement/key-issues/protecting/charities\_execorder\_13224-i.shtml">http://www.treasury.gov/offices/enforcement/key-issues/protecting/charities\_execorder\_13224-i.shtml</a>.

<sup>&</sup>lt;sup>6</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 57.

<sup>&</sup>lt;sup>7</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 65. <u>See also</u>: <u>United States v. Usama bin Laden, et al.</u> S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York. Trial Transcript, February 15, 2001. Pages 829-830.

<sup>8</sup> United States v. Usama bin Laden, et al. S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York. February 6, 2001. Pages 176-177. See also: The 9/11 Commission Report. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 127.

<sup>&</sup>lt;sup>9</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 56.

<sup>&</sup>lt;sup>10</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 56.

as the joint spiritual leader of the two leading terrorist organizations in Egypt, the Islamic Jihad and Al-Gama`at al-Islamiyya.<sup>11</sup> In October 1995, Rahman was convicted in U.S. federal court of seditious conspiracy for inspiring a series of terrorist plots in the New York metropolitan area, including the February 1993 bombing of the World Trade Center.<sup>12</sup> The Blind Shaykh is currently serving a life sentence at a maximum security federal penitentiary.

In 1991, facing the collapse of the jihad in Afghanistan and growing hostility from his home government in Saudi Arabia, Bin Laden moved to Sudan and set up a large and complex set of business and terrorist enterprises; including, Wadi al-Aqiq, Taba Investments, Hijra Construction, and Blessed Fruits Corporation. <sup>13</sup> In addition to his commercial interests, Bin Laden also used his haven in Sudan in order to sponsor overseas terrorist activities. In Sudan, Bin Laden established an "Islamic Army Shura" that was to serve as the coordinating body for the consortium of terrorist groups with which he was forging alliances. It was composed of his own Al Qaeda Shura together with leaders or representatives of Islamist terrorist organizations that were still independent of Al-Qaida. <sup>14</sup>

Al-Qaida's leaders were particularly angry at the United States because of the lingering presence of American troops in Saudi Arabia following the 1991 Persian Gulf War. Bin Laden and his associates believed that Islamic doctrine explicitly prohibits the presence of infidels, or non-Muslims, in the "Land of the Two Holy Places" – in other words, the Arabian Peninsula, home to the sacred Muslim cities of Mecca and Medina. In December 1991, Islamic militants launched a failed bomb attack at a hotel in Aden, Yemen targeting 100 U.S. soldiers who were staying there en route to peacekeeping duties in nearby Somalia. The bombing in Aden—which ended up killing two Australian tourists—came in response to a "fatwah", or religious edict, issued on behalf of Al-Qaida in late 1991 – which condemned the presence of U.S. military peacekeepers as an attempt to colonize the Muslim world. According to a former top member of Al-Qaida, this fatwah was discussed at Al-Qaida terrorist guesthouses in Khartoum, Sudan—and subsequently endorsed by Al-Qaida's then-chief military commander, Abu Ubaidah Al-Banshiri. 15

In late 1992, Usama Bin Laden presided over meetings of terrorist leaders at Al-Qaida guesthouses in Khartoum, Sudan. Al-Qaida military commander Abu

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<sup>&</sup>lt;sup>11</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 56.

<sup>&</sup>lt;sup>12</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 72.

<sup>&</sup>lt;sup>13</sup> <u>United States v. Usama bin Laden, et al</u>. S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York. Trial Transcript, February 6, 2001. Pages 239-243.

<sup>&</sup>lt;sup>14</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 58.

<sup>&</sup>lt;sup>15</sup> <u>United States v. Usama bin Laden, et al.</u> S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York. Trial Transcript, February 6, 2001. *Page 268*.

Ubaidah al-Banshiri told other Al-Qaida members that Al-Qaida was eager for the U.S. to embroil itself in the civil war in Somalia so "that we make a big war with them." <sup>16</sup> In late 1993, Bin Laden announced to a large group of 30-40 Al-Qaida members that "the American army now they came to the Horn of Africa, and we have to stop the head of the snake... the snake is America, and we have to stop them. We have to cut the head and stop them." <sup>17</sup>

In 1993, Al-Qaida's leaders agreed to dispatch Al-Qaida Shura Council member Mohammed Atef (a.k.a. Abu Hafs al-Masri) from Sudan to nearby Somalia in order to train local Somalis and organize a military operation targeting U.S. forces. 18. Later that year, in October, specially-trained Somali militiamen armed with Rocket Propelled Grenades shot down two U.S. Blackhawk helicopters over the capital Mogadishu. The ensuing street battle killed 18 U.S. servicemen. Soon afterwards, Abu Hafs returned from Somalia and spoke with other Al-Qaida members in the Sudan—boasting, "everything happening in Somalia, it's our responsibility... the al Qaeda group, our group." 19.

### Part III: Return to Afghanistan

In 1996, coming under increased international pressure from the United States and other nations, the regime in Sudan ordered Usama Bin Laden and his associates to leave the country. Once again, Bin Laden's attention returned to Afghanistan. While Bin Laden had been living in exile in Africa, large parts of Afghanistan had come under the control of a growing military force, the extremist Taliban militia. In a secret memorandum to other Al-Qaida leaders, Abu Hafs al-Masri endorsed the Taliban as an attractive new ally for Al-Qaida. He explained, "The position [of Taliban leaders] towards the Arabs who fought Jihad in Afghanistan is an excellent one, a great welcome and an acknowledgment of what the Arab Mujahideen have sacrificed and their right to stay in Afghanistan as Muslims and as Mujahideen... This will be a new turning point for the benefit of the Islamic world. Our duty towards the Taliban movement is to stand behind it, support it materially and morally, especially that its regional and international enemies are working night and day to put an end to it and make it fail." <sup>20</sup>

At the invitation and acquiescence of Taliban and other mujahideen leaders, Bin Laden and his entourage relocated from Sudan to Afghanistan and

<sup>&</sup>lt;sup>16</sup> <u>United States v. Usama bin Laden, et al</u>. S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York. Trial Transcript, February 6, 2001. *Page 280-285*.

<sup>&</sup>lt;sup>17</sup> <u>United States v. Usama bin Laden, et al</u>. S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York. Trial Transcript, February 6, 2001. *Page 280-285*.

<sup>&</sup>lt;sup>18</sup> <u>United States v. Usama bin Laden, et al</u>. S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York. Trial Transcript, February 6, 2001. *Page 280-285*.

<sup>&</sup>lt;sup>19</sup> <u>United States v. Usama bin Laden, et al</u>. S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York. Trial Transcript, February 6, 2001. *Page 280-285*.

<sup>&</sup>lt;sup>20</sup> Government Exhibit GX-300B. <u>United States v. Usama bin Laden, et al.</u> S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York.

rededicated themselves to their campaign to confront the United States directly for its support of Israel and its continuing presence and influence in the Arabian Peninsula. From his new but familiar home in the Hindu Kush mountains, Bin Laden published a "declaration of war" in August 1996. In his declaration, he wrote:

"It is now clear that those who claim that the blood of the American soldiers (the enemy occupying the land of the Muslims) should be protected are merely repeating what is imposed on them by the regime; fearing the aggression and interested in saving themselves. It is a duty now on every tribe in the Arab Peninsula to fight, Jihad, in the cause of Allah and to cleanse the land from those occupiers. Allah knows that there blood is permitted (to be spilled) and their wealth is a booty; their wealth is a booty to those who kill them... Our youths knew that the humiliation suffered by the Muslims as a result of the occupation of their sanctities can not be kicked and removed except by explosions and Jihad... Death is better than life in humiliation! Some scandals and shames will never be otherwise eradicated. My Muslim Brothers of The World: Your brothers in Palestine and in the land of the two Holy Places are calling upon your help and asking you to take part in fighting against the enemy -your enemy and their enemy- the Americans and the Israelis. They are asking you to do whatever you can, with one own means and ability, to expel the enemy, humiliated and defeated, out of the sanctities of Islam.",21

Six months after Usama Bin Laden declared war on the United States, CNN journalist Peter Arnett traveled to Afghanistan to interview Bin Laden about the implications of his declaration.

### Part IV: Training Camps

In order to successfully complete its military operations against the United States, a new generation of Al-Qaida footsoldiers would need to be trained and indoctrinated. Starting in 1988, Al-Qaida-linked mujahideen factions established a host of jihad training camps in Muslim "hot spots" such as Afghanistan, Pakistan, Bosnia-Herzegovina, Chechnya, and the Philippines. Inside Afghanistan, between 1988 and 2001, Al-Qaida and affiliated jihadist movements built a host of military training camps. Though not all of these camps were officially controlled by Al-Qaida, likeminded training camp managers had agreements with Bin Laden to conduct reciprocal recruiting efforts and exchange programs.<sup>22</sup>

• The Al-Farouq camp was a widely-known facility west of Kandahar in southern Afghanistan where new jihadist recruits could receive basic

<sup>&</sup>lt;sup>21</sup> Committee for the Defense of Legitimate Rights (CDLR) <100043.1420@CompuServe.COM>.

<sup>&</sup>quot;MSANEWS: THE LADENESE EPISTLE: DECLARATION OF WAR (I)." <u>MSANews</u>. <u>http://msanews.mynet.net</u>.. October 12, 1996.

<sup>&</sup>lt;sup>22</sup> The 9/11 Commission Report. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 500.

training. At least seven Saudi nationals who later served as suicide hijackers in the September 11, 2001 terrorist attacks received their "basic training" at Al-Farouq. According to the Congressional 9/11 Commission, "[t]his particular camp appears to have been the preferred location for vetting and training the potential muscle hijackers because of its proximity to Bin Ladin and senior al Qaeda leadership." <sup>23</sup> Recruits at Al-Farouq were given regular lectures by Usama Bin Laden and other Al-Qaida commanders outlining Al-Qaida's desire for a military confrontation with the United States.

- Closer to the heart of Taliban power, Tarnak Farms—a key Al-Qaida compound consisting of roughly 80 concrete or mud-brick buildings surrounded by a 10-foot wall—was located in an isolated area on the outskirts of the Kandahar airport.<sup>24</sup>
- The Khaldan Camp consisted of approximately 100 men divided into cells of between six and fourteen recruits each. The Khaldan regimen included training in rocket launchers and the fabrication of explosives. Cells were taught to exist and operate independently of any central command structure. According to captured Al-Qaida operatives, students at Khalden learned "how to blow up the infrastructure of a country", including public utilities, airports, railroads, hotels, and large corporations—"we were speaking about America as an enemy of Islam." 25
- Located northwest of Jalalabad, the Derunta Complex consisted of several smaller camps run by a collection of Al-Qaida members and associates, including, Abu Musab al-Suri (a.k.a. Mustafa Setmariam Nasar) and Abu Khabab al-Masri (a.k.a. Midhat Mursi). According to militants who enrolled in courses at Derunta, the training lasted for approximately thirty days and included everything from instruction on small arms to explosives and the use of toxic chemicals. Advanced classes were held at Derunta demonstrating the use of poisons, including experiments with cyanide on dogs. The purpose of the chemical training offered at Derunta was to prepare for the assassination of prominent world leaders and intelligence agents.<sup>26</sup>

### Part V: 1998 Embassy Bombings

Back in Afghanistan and with growing numbers of mujahideen recruits arriving at training camps in Afghanistan, Usama Bin Laden decided to formalize

<sup>&</sup>lt;sup>23</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 234.

<sup>&</sup>lt;sup>24</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Pages 111-112.

<sup>&</sup>lt;sup>25</sup> Cross-examination of Ahmed Ressam. <u>United States v. Mokhtar Haouari</u>. United States District Court Southern District of New York. Case: 00CR15. June 27-July 6, 2001. *Page 626*.

<sup>&</sup>lt;sup>26</sup> Cross-examination of Ahmed Ressam. <u>United States v. Mokhtar Haouari</u>. United States District Court Southern District of New York. Case: 00CR15. June 27-July 6, 2001. *Page 626*.

his relationship with other regional jihad leaders willing to support a military confrontation with the United States. In February 1998, Bin Laden convened a press conference in Afghanistan with likeminded allies to announce the founding of the World Islamic Front Against Jews and Crusaders. Bin Laden and his colleagues signed a joint fatwah requiring all Muslims able to do so to kill Americans—whether civilian or military—anywhere they can be found and to "plunder their money." Bon May 29, 1998, Usama Bin Laden issued a second declaration entitled "The Nuclear Bomb of Islam," under the banner of his new "World Islamic Front," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God." 29

On August 7, 1998, two U.S. embassies in East Africa were suicide-bombed almost simultaneously by Al-Qaida cells deemed loyal to Zawahiri's Egyptian Al-Jihad faction. The twin explosions rocked the embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania, ultimately killing 257 people including 12 Americans.<sup>30</sup> As a result, on August 20, 1998, the U.S. launched retaliatory tomahawk missile strikes on terrorist training camps in Afghanistan and a suspected chemical weapons laboratory in Khartoum, Sudan.<sup>31</sup>

In response to the U.S. missile strikes on Al-Qaida training camps in Afghanistan, Shaykh Omar Abdel Rahman issued a new fatwah from inside his American jail cell urging new recruits to join the cause: "Oh, Muslims everywhere! Cut the transportation of their countries, tear it apart, destroy their economy, burn their companies, eliminate their interests, sink their ships, shoot down their planes, kill them on the sea, air, or land. Kill them when you find them, take them and encircle them, paralyze their every post." 32. Al-Qaida terrorist Ahmed Ressam, who was convicted for a failed bomb plot in Los Angeles on the eve of the Millenium, later recalled Abdel Rahman's fatwah distributed widely at the Khalden and Derunta camps in Afghanistan. According to Ressam, the flyer had Rahman's photo on it and "it said it was a fatwah by Omar Abdel Rahman from prison. It says fight Americans and hit their interest everywhere." 33.

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<sup>&</sup>lt;sup>27</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 47.

<sup>&</sup>lt;sup>28</sup> "Text of World Islamic Front's Statement Urging Jihad Against Jews and Crusaders." <u>Al Quds al Arabi</u>. Feb.

<sup>23, 1998.</sup> 

<sup>&</sup>lt;sup>29</sup> Government Exhibit GX-1610T. <u>United States v. Usama bin Laden, et al</u>. S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York.

<sup>&</sup>lt;sup>30</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 70.

<sup>&</sup>lt;sup>31</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 117.

<sup>&</sup>lt;sup>32</sup> Excerpted from the will and testament of Shaykh Omar Abdel Rahman, written in an American prison cell. <u>Al-Minhaj</u>. Page 27. <a href="http://www.badr.com">http://www.badr.com</a>. Dated: 1997.

<sup>&</sup>lt;sup>33</sup> Direct Examination of Ahmed Ressam. <u>United States v. Mokhtar Haouari</u>. United States District Court Southern District of New York. Case: 00CR15. June 27-July 6, 2001. *Page 552*.

In November 1998, the U.S. Justice Department filed an official criminal indictment targeting Bin Laden and a host of associates for their involvement in the East Africa Embassy bombings. The co-defendants included Al-Qaida Shura Council members Ayman al-Zawahiri, Abu Hafs al-Masri (a.k.a. Mohammed Atef), Abu Hajer al-Iraqi (a.k.a. Mamdouh Mahmud Salim), and Saif al-Adel.<sup>34</sup>. Though Bin Laden remained at large, several indicted defendants were arrested and brought to trial in federal court in the Southern District of New York: Mohammed al-Owhali, a failed suicide bomber involved in the attack on the U.S. embassy in Nairobi; Khalfan Khamis Mohamed, who purchased the delivery truck and helped build the bomb used in the attack on the U.S. embassy in Dares-Salaam; Mohamed Sadiq Odeh, an explosives expert and leading member of the Al-Qaida terror cell based in Nairobi; and Wadih el-Hage, a Lebanese-American who had served as Bin Laden's personal secretary and was charged with conspiracy to kill U.S. nationals. In June 2001, al-Owhali, Khalfan Khamis Mohamed, Odeh, and El-Hage were convicted in federal court.

On October 9, 1999, the U.S. government announced the official designation of Al-Qaida as a foreign terrorist organization because of its involvement in several major terrorist attacks, including the August 1998 East Africa embassy bombings. The designation made it unlawful for anyone in the United States to provide material support to Al-Qaida, froze material resources linked to Al-Qaida and held custody by U.S. financial institutions, and allowed the expulsion of any Al-Qaida members or representatives living in the United States.<sup>35</sup>

### Part VI: Attack on U.S.S. Cole

In January 2000, the Al-Qaida network attempted to carry out its most significant terrorist operation since the 98 embassy bombings: a suicide boat bombing attack on a U.S. naval vessel during refueling off the coast of Yemen. But before the boat could reach its target, the U.S.S. The Sullivans, the overloaded craft packed with explosives began taking on water and sank. The same boat was recovered from Aden harbor and prepared for a follow-up attack on a new target.<sup>36</sup>

That following September, a new videotape mysteriously surfaced of Bin Laden and other terrorist leaders meeting in Afghanistan apparently for the wedding of Bin Laden's son Saad. The tape—which was widely aired on Arabic-language satellite television networks and by ABC News in the United States—

<sup>&</sup>lt;sup>34</sup> Indictment. <u>United States v. Usama bin Laden, et al</u>. S(7) 98 Cr. 1023 (LBS). United States District Court, Southern District of New York.

<sup>&</sup>lt;sup>35</sup> "Department of State Public Notice 3130: Office of the Coordinator For Counterterrorism; Designation of

Foreign Terrorist Organizations." <u>Federal Register</u>. Vol. 64, No. 195. October 8, 1999. Page 55112.

<sup>&</sup>lt;sup>36</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 180.

included a speech by Bin Laden himself, who and promised "to work with all our power to free our brother, Sheikh Omar Abdel Rahman, and all our prisoners in America, Egypt, and Riyadh." Other speakers on the tape indicated that the time had come for Muslims to "move forward and shed blood." <sup>37</sup>

In October 2000, ten months after the failed attack on The Sullivans, Al-Qaida operatives succeeded in using the same vessel to carry out a devastating bomb blast alongside the U.S.S. Cole, killing 17 American sailors, wounding 39 others, and causing nearly \$250 million in damage.<sup>38</sup> The Cole operation came at the direction and urging of Usama Bin Laden, Abu Hafs Al-Masri, and other senior Al-Qaida leaders. A lower-level Al-Qaida operative, Fahd Quso, was instructed by his commanders to videotape the planned terrorist operation on the U.S.S Cole—but claims to have overslept and missed his opportunity to record it.<sup>39</sup>

Despite being thwarted in his attempts to arrange for live video footage of the U.S.S. Cole terror attack, Bin Laden had still won a propaganda victory in Yemen and commissioned Al-Qaida's Media Wing to produce a full-length recording memorializing the attack and claiming it in Al-Qaida's name. In early 2001, Al-Qaida's Media Wing—now known as the As-Sahab Media Foundation—released its first video production, entitled "The Destruction of the U.S.S. Cole", which was distributed around the world using radical mosques and Islamic bookstores in Europe and through the Internet. Parts of the video were later recovered at Al-Qaida safehouses and in the custody of a variety of Al-Qaida suspects around the world.

Both Badawi and Quso were indicted by U.S. federal prosecutors in 2003 for their role in facilitating the attack on the Cole.<sup>41</sup>. The indictment also named Usama Bin Laden, Saif al-Adel, Abdel Rahim Al-Nashiri and Tawfiq Bin Attash as unindicted co-conspirators. According to his statement to the FBI, Badawi, a key Yemeni Al-Qaida operative recruited by members of Bin Laden's inner circle, helped procure safehouses in Aden for the suicide bombers, provided the boat used in the attack, and the trailer and truck used to tow the boat to Aden harbor. In September 2004, a Yemeni court convicted six men for their involvement in the Cole conspiracy, including Nashiri, Badawi, and Quso.

On November 29, 2000, Sheikh Hammoud Al-Uqlaa' Ash-Shuaibi, a leading Islamic cleric in Saudi Arabia, issued a new fatwah, or religious edict, concerning

<sup>&</sup>lt;sup>37</sup> Cooley, John. "'We will free our brothers!'" <u>ABC News</u>. September 25, 2000.

<sup>&</sup>lt;sup>38</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 190.

<sup>&</sup>lt;sup>39</sup> Indictment. <u>United States v. Jamal al-Badawi and Fahd al-Quso</u>. S12 98 Cr. 1023 (KDT). United States District Court, Southern District of New York. May 15, 2003. Pages 13–14. <u>See also</u>: <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 191.

<sup>&</sup>lt;sup>40</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 191.

<sup>&</sup>lt;sup>41</sup> Indictment. <u>United States v. Jamal al-Badawi and Fahd al-Quso</u>. S12 98 Cr. 1023 (KDT). United States District Court, Southern District of New York. May 15, 2003.

the Taliban movement in Afghanistan.<sup>42</sup>. The fatwah was widely reprinted in Middle Eastern newspapers and on many Islamic Internet message forums.<sup>43</sup>. According to the fatwah, because the enemies of the Taliban among the Northern Alliance were being backed by "the forces of Disbelief like America, Britain, and Russia", it is "obligatory" to assist the Taliban and "to make jihad with it in order to bring victory to Islam."

One of the prominent websites carrying Ash-Shuaibi's fatwah, the U.K.-based Azzam Publications, also published warnings quoting Taliban intelligence sources of "a joint American and Russian attack on Afghanistan involving chemical weapons expected at any time." Azzam Publications issued an open appeal to Muslims all over the world to come to the assistance of their Taliban brothers, including facilitating the purchase and delivery of "large quantities" of cash and chemical warfare suits to the Taliban. These warnings coincided with a general build-up of Al-Qaida recruits at training camps in Afghanistan as Al-Qaida and the Taliban forecasted imminent developments in the battle to liberate Jerusalem.

### Part VII: September 11, 2001

Throughout the summer of 2001, the Taliban launched major offensives seeking to overrun remaining pockets of territory controlled by their adversaries from the Northern Alliance—led by Afghan mujahideen icon Ahmad Shah Massoud. On September 9, 2001, Massoud was assassinated in a suicide bomb attack executed by Al-Qaida operatives posing as journalists. 45 With Massoud dead and his forces in disarray, Al-Qaida succeeded in decapitating the enemies of the Taliban and removing the only political leader with both the local and international credibility to confront the Taliban.

Two days later, it became clear that Massoud's killing was about more than just the conquest of Afghanistan. Nineteen young men recruited by Al-Qaida hijacked four commercial airliners on the east coast of the United States and suicide crashed three of them into the Pentagon in Washington D.C. and the World Trade Center in New York before passengers were able to force hijackers on the final flight to preemptively crash their aircraft in Pennsylvania.

 American Airlines Flight 11, a Boeing 767 enroute from Boston to Los Angeles, was commandeered at approximately 8:13am on September 11, 2001. The five-man hijacker team was led by suicide pilot Mohammed

<sup>42 &</sup>quot;Fatwa of Sheikh Hammoud Al-Uqlaa: 2 Ramadan 1421/ 29 November 2000."

<sup>.</sup>http://www.azzam.com/html/talibanfatwahammoud.htm. February 2001. 43 .http://www.azzam.com/images/talibanhammoudfatwa1.jpg.,

<sup>.</sup>http://www.azzam.com/images/talibanhammoudfatwa2.jpg.. February 2001.

<sup>&</sup>lt;sup>44</sup> "Joint U.S./Russian Chemical Attack on Afghanistan Imminent." November 2000. <a href="http://www.azzam.com/html/newsnov00.htm">http://www.azzam.com/html/newsnov00.htm</a>.

<sup>&</sup>lt;sup>45</sup> The 9/11 Commission Report. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Page 252.

Atta and also included Saudi nationals Waleed al-Shehri, Wail al-Shehri, Abdulaziz al-Omari, and Satam al-Suqami. At 8:46am, Mohammed Atta intentionally crashed American Airlines Flight 11 into the North Tower of the World Trade Center in downtown Manhattan.<sup>46</sup>

- United Airlines Flight 175, a Boeing 767 enroute from Boston to Los Angeles was commandeered at approximately 8:45am. The five-man hijacker team was led by suicide pilot Marwan al-Shehhi and also included one other UAE national Fayez Banihammad and three additional Saudi nationals—Mohand al-Shehri, Hamza al-Ghamdi, and Ahmed al-Ghamdi. At 9:03am, Marwan al-Shehhi intentionally crashed United Airlines Flight 175 into the South Tower of the World Trade Center.<sup>47</sup>
- American Airlines Flight 77, a Boeing 757 enroute from Washington D.C. to Los Angeles was commandeered at approximately 8:52am. The five-man hijacker team was led by suicide pilot Hani Hanjour and also included Saudi nationals Khalid al-Mihdar, Majed Moqed, Nawaf al-Hazmi, and Salem al-Hazmi. At 9:37am, Hani Hanjour intentionally crashed American Airlines Flight 77 into the western side of the Pentagon in Washington D.C.<sup>48</sup>
- United Airlines Flight 93, a Boeing 757 enroute from Newark to San Francisco, was commandeered at approximately 9:28am. The four-man hijacker team was led by suicide pilot Ziad Jarrah and also included Saudi nationals Ahmed al-Haznawi, Ahmad al-Nami, and Saeed al-Ghamdi. At 10:30am, facing an apparent revolt by captive passengers, Ziad Jarrah intentionally crashed United Airlines Flight 93 into an empty field in eastern Pennsylvania, 150 miles northwest of his team's intended target in Washington D.C.<sup>49</sup>

Within only weeks of 9/11, Al-Qaida began to take explicit credit for the execution of the 9/11 terrorist attacks, both in televised speeches by senior Al-Qaida leaders and through a series of propaganda videos featuring the martyrdom wills of 9/11 hijackers. In the years since 9/11, Al-Qaida has continued in its pursuit of war with America, targeting U.S. interests around the world.

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<sup>&</sup>lt;sup>46</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Pages 1-2, 4-7.

<sup>&</sup>lt;sup>47</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Pages 1-2, 7-8.

<sup>&</sup>lt;sup>48</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Pages 2-4, 8-10.

<sup>&</sup>lt;sup>49</sup> <u>The 9/11 Commission Report</u>. Final Report of the National Commission on Terrorist Attacks Upon the United States. July 22, 2004. Pages 4-5, 10-14.

### Evan F. Kohlmann

http://www.globalterroralert.com

### **EDUCATION**

### University of Pennsylvania Law School, Philadelphia, Pennsylvania

J.D. (Juris Doctor) 2004; James Wilson Scholarship Recipient.

### Georgetown University, Washington, DC

Edmund A. Walsh School of Foreign Service, BSFS 2001, Magna Cum Laude

- Major: International Politics, concentration in International Security Studies.
  - o Minor: Islamic Studies (Center for Muslim Christian Understanding, Georgetown University)
- Honors & Awards: Honors in International Politics; Georgetown University Rhodes Scholar Nominee, 2000.
- Research assistant for Dr. Mamoun Fandy in the Center for Contemporary Arab Studies (CCAS) (Fall 2000).

#### **EXPERIENCE**

### • Senior Investigator

August 2005 – present

### Nine Eleven Finding Answers Foundation (NEFA), New York, NY

o The NEFA Foundation is a non-profit organization created after the attacks of September 11, 2001. The Foundation strives to help prevent future tragedies in the U.S. and abroad by independently tracking those responsible for planning, funding, and executing terrorist activities, with a particular emphasis on Islamic militant organizations. The Foundation plays a role in the fight against terror through cohesive and comprehensive efforts to research, analyze, and disseminate information pertaining to past and current terrorist activities.

• *Consultant* May 2005 – June 2005

### Office of the High Representative (OHR), Sarajevo, Bosnia-Herzegovina

- o The OHR is the chief civilian peace implementation agency in Bosnia-Herzegovina. I was hired as a short-term consultant by OHR to personally travel to Sarajevo and give briefings to intelligence analysts based at Camp Butmir on the status of foreign mujahideen veterans in the Balkans and the ongoing role of foreign charitable organizations.
- Assisted in the analysis of confidential intelligence documents, and provided original documentation to add to their records. Gathered firsthand intelligence data in various regions of central Bosnia-Herzegovina concerning suspect corporate entities under criminal investigation by local authorities.

### • On-Air Terrorism Analyst

October 2004 – present

### NBC News/MSNBC, Washington, DC

- NBC News is the news division of the U.S. television network NBC Universal. It has ranked as the top-rated broadcast news division in the United States for over ten years. MSNBC is NBC Universal's 24-hour cable news and information network.
- o Provided frequent on-air analysis and discussion regarding ongoing news stories relating to international terrorism. Assisted in the production of both evening news segments and full-length television documentaries relating to international terrorism.

#### • Founder, CEO

February 2004 – present

### Globalterroralert.com, New York, NY

- o Globalterroralert.com was founded in early 2004 as an information clearinghouse on international terrorism. It is regularly cited as a source by respected media outlets—including NBC News, the BBC, the Washington Post, the Los Angeles Times, and the Associated Press.
- o Researched terrorist fundraising and recruitment networks using sources including declassified intelligence documents, exhibits submitted in terror-related legal cases, Lexis-Nexis, the World Wide Web, the Foreign Broadcast Information Service (FBIS), and other information retrieval sources. Interviewed alleged terrorist recruiters, terrorist facilitators, and cooperating defendants in criminal cases. Drafted public news articles and unclassified memoranda for both private clients and international law enforcement and intelligence agencies examining international terrorism, its sponsors, and its causes.

### • Senior Terrorism Consultant

February 1998 – January 2004

### Investigative Project, Washington, DC

- o The Investigative Project is an open source counterterrorism think-tank and policy group founded in 1995.
- Researched terrorist fundraising and recruitment networks. Interviewed alleged terrorist recruiters and terrorist facilitators for Al-Qaida, Hamas, and other groups (including notorious UK-based clerics Abu Hamza Al-Masri and Shaykh Omar Bakri Mohammed). Briefed government officials on terrorist fundraising, recruitment, and communication networks in the U.S.

INVOLVEMENT IN U.S. LEGAL CASES:	HIRED AS EXPERT CONSULTANT	TESTIFIED AS FACT WITNESS	TESTIFIED AS EXPERT
U.S. v. JEFFREY BATTLE ET AL.	X		
(DISTRICT OF OREGON, 2003)			
U.S. V. MASOUD KHAN ET AL.	X	X	
(EASTERN DISTRICT OF VIRGINIA, 2004)			
U.S. v. RANDALL ROYER (EASTERN DISTRICT OF VIRGINIA, 2004)	X		
U.S. v. SABRI BENKHALA			
(EASTERN DISTRICT OF VIRGINIA, 2004)	X		X
U.S. v. ALI TIMIMI			
(EASTERN DISTRICT OF VIRGINIA, 2005)	X		X
U.S. v. Uzair Paracha			
(SOUTHERN DISTRICT OF NEW YORK, 2005)	X		X
U.S. v. AHMED OMAR ABU ALI			
(EASTERN DISTRICT OF VIRGINIA, 2005)	X		
U.S. v. HAMID HAYAT			
(EASTERN DISTRICT OF CALIFORNIA, 2006)	X		
U.S. v. ALI ASAD CHANDIA			
(EASTERN DISTRICT OF VIRGINIA, 2006)	X		X
U.S. v. Yassin Aref et al.			
(Northern District of New York, 2006)	X		X
U.S. v. Sabri Benkhala			
(EASTERN DISTRICT OF VIRGINIA, 2007)	X		X
U.S. v. RAFIO SABIR			
(SOUTHERN DISTRICT OF NEW YORK, 2007)	X		X
U.S. v. JOSE PADILLA ET AL.			
(SOUTHERN DISTRICT OF FLORIDA, 2007)	X		
U.S. v. EMADEDDINE MUNTASSER ET AL.			
(DISTRICT OF MASSACHUSETTS, 2007)	X	(UPCOMING)	
U.S. v. MOHAMMED AMAWI ET AL.			
(NORTHERN DISTRICT OF OHIO, 2008)	X	(UPCON	MING)
INVOLVEMENT IN INTERNATIONAL LEGAL CASES:	HIRED AS EXPERT CONSULTANT	TESTIFIED AS FACT WITNESS	TESTIFIED AS EXPERT
INTERNATIONAL PROSECUTORS V. ABDULADHIM MAKTOUF	<b>T</b> 7		₹7
(SUPREME COURT OF BOSNIA-HERZEGOVINA, 2005)	X		X
REGINA V. MOHAMMED AJMAL KHAN AND PALVINDER SINGH	<b>T</b> 7		<b>T</b> 7
(SNARESBROOK CROWN COURT, U.K., 2006)	X		X
REGINA V. AL BASHIR MOHAMMED AL-FAQIH	<b>T</b> 7		
(WOOLWICH CROWN COURT, U.K., 2007)	X		
REGINA V. TSOULI, DAOUR, AND MUGHAL	<b>T</b> 7	•	
(WOOLWICH CROWN COURT, U.K., 2007)	X	X	
REGINA V. RAJA, MALIK, IQBAL, ZAFAR, AND BUTT	v		
(OLD BAILEY, U.K., 2007)	X		
H.M.A. v. MOHAMMED ATIF SIDDIQUE	v		v
(GLASGOW HIGH COURT, SCOTLAND, 2007)	X		X
REGINA V. SAMINA MALIK	v		v
(OLD BAILEY, U.K., 2007)	X		X
REGINA V. HASSAN MUTEGOMBWA	v		X
(OLD BAILEY, U.K., 2007)	X		Λ
REGINA V. BILAL KHAZAAL	X	(Uncos	AINC)
(SUPREME COURT OF NEW SOUTH WALES, AUSTRALIA, 2007)	Α	(UPCOMING)	
REGINA V. DITTA AND BILAL	X	(UPCOM	AING)
(LEEDS CROWN COURT, U.K., 2008)	Λ	(UPCON	mwo)
REGINA V. KHAN, SULIEMAN, AND MUHAMMED	X	(UPCOMING)	
(OLD BAILEY, U.K., 2008)	Α	(UPCO)	(J
INTERNATIONAL PROSECUTORS V. RASIM DELIC	X	(UPCOM	MING)
(INTERNATIONAL COURT OF JUSTICE AT THE HAGUE, 2008)	Λ	(UPCON	11110)

### **BOOKS AND PAPERS**

- Author <u>Al-Qaida's Jihad in Europe: The Afghan-Bosnian Network</u>, (Berg Publishers, September 2004)
   (<a href="http://www.bergpublishers.com">http://www.bergpublishers.com</a>). [Cited as a source by the final report of the Congressional 9/11 Commission]
  - [Dr. Marko Hoare, History Faculty, University of Cambridge and author of How Bosnia Armed]: "Written by a genuine expert in the subject...this is a lucid and informed account of the involvement of the mujahedin in Bosnia, one that lays the myths to rest... This excellent book is essential reading for anyone wishing to understand the truth about an episode of the Bosnian war that is so frequently misrepresented by those with a political motive for doing so."
  - o [Political Science Quarterly (PSQ)]: "About [Al-Qaida's] operations in Europe, Evan F. Kohlmann has written an illuminating book... Kohlmann is at his best in exhaustively reporting the details of such terrorist episodes. He has compiled prodigious research about the perpetrators and their support networks. Moreover, he never loses sight of the strategy behind the individual attacks... [a] genuine historical analysis."<sup>2</sup>
  - o [Studies in Conflict and Terrorism]: "This book is a pathbreaking piece of research... Kohlmann addresses the issue in unprecedented detail, exploiting a wide variety of available sources to piece together a largely neglected segment of contemporary Bosnian history... [which] provide critical insights into terrorist preferences, motives, and interests... The book... is descriptive and empirically rich."
  - Al-Qaida's Jihad in Europe has consistently been used as a required or recommended course text in numerous undergraduate and graduate courses in North America, Europe, and Australia, including the following courses:
    - (Spring 2005) "Terrorism, Security, and Intelligence"
      - Graduate course taught by former NSC counterterrorism czar Richard Clarke and former White House Senior Director for Combating Terrorism Rand Beers at Harvard University's Kennedy School of Government.<sup>3</sup>
    - (Fall 2006) "South Asia, Al Qaeda and the Rise of International Terrorism
      - Graduate course taught by Professor Peter Bergen at the Paul H. Nitze School of Advanced International Studies at Johns Hopkins University.<sup>4</sup>
    - (Spring 2007) "Terrorism and Modern Society"
      - Course taught by Dr. Keith Hayward and Professor Frank Furedi at the School of Social Policy, Sociology, and Social Research at the University of Kent (Canterbury campus).<sup>5</sup>

#### • Major Papers:

- o "The Legacy of the Arab-Afghans: A Case Study." Georgetown University International Politics Honors Thesis, April 2001.
- "Arabian Gulf Financial Sponsorship of Al-Qaida via U.S.-Based Banks, Corporations, and Charities." Testimony before the U.S. House Committee on Financial Services, Subcommittee on Oversight and Investigations. March 11, 2003.
- o "The Bosnian Mujahideen: Origins, Training and Implications." Published as a chapter in The Making of a Terrorist, edited by Director of Terrorism Studies at the United States Military Academy Dr. James JF Forest. Praeger Security International, 2005.
- o "Al-Qaida in Saudi Arabia: 2002-2003." Occasional Report published by the Nine Eleven Finding Answers (NEFA) Foundation. December 2005.
- o "The Role of Islamic Charities in International Terrorist Recruitment and Financing." Danish Institute for International Studies (DIIS) Working Paper 2006; January 2006.
- o "The Afghan-Bosnian Mujahideen Network in Europe." Paper presented before the Swedish National Defence College Center for Asymmetric Threats (CATS) Workshop; May 2006.
- o "The Jihadists of Pakistan: Jaish-e-Muhammad (JEM), Harakat ul-Mujahideen (HUM), and Anjuman Sipah-e-Sahaba (SSP)." Occasional Report published by the Nine Eleven Finding Answers (NEFA) Foundation. August 2006.
- "The Real Online Terrorist Threat." Foreign Affairs. Vol. 85; No. 5. September/October 2006.
- o "The North African Mujahideen Network of the Western Balkans." Bosnian Security After Dayton: New Perspectives. Edited by Michael Innes. Routledge; October 2006.
- o "Two Decades of Jihad in Algeria: the GIA, the GSPC, and Al-Qaida." Occasional Report published by the Nine Eleven Finding Answers (NEFA) Foundation. May 2007.
- "State of the Sunni Insurgency in Iraq: August 2007." Occasional Report published by the Nine Eleven Finding Answers (NEFA) Foundation. August 2007.
- "Dossier: The Libyan Islamic Fighting Group (LIFG)." Occasional Report published by the Nine Eleven Finding Answers (NEFA) Foundation. October 2007.

<sup>3</sup> http://ksgnotes1.harvard.edu/degreeprog/courses.nsf/webnumber/ISP213.

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<sup>&</sup>lt;sup>1</sup> http://www-hjs.pet.cam.ac.uk/sections/balkans/document.2005-04-28.6595030101

<sup>&</sup>lt;sup>2</sup> http://www.ciaonet.org/olj/psq/psq\_fal05/

<sup>&</sup>lt;sup>4</sup> http://eres.sais-jhu.edu/coursepage.asp?cid=165.

<sup>&</sup>lt;sup>5</sup> http://library.kent.ac.uk/library/readinglists/displaylist?module=SO594.



### Law School

# Nuremberg Trial Proceedings Volume 3

### SEVENTEENTH DAY Tuesday, 11 December 1945

Morning Session

Sixteenth Day Volume 3 Menu Eighteenth Day

Nuremberg Trials Page

COL. STOREY: If the Tribunal please, the United States next offers in evidence some captured moving pictures through Commander Donovan, who had charge of taking them.

COMMANDER JAMES BRITT DONOVAN (Assistant Trial Counsel for the United States): May it please the Tribunal, the United States now offers in evidence Document Number 3054-PS, United States Exhibit Number 167, the motion picture entitled *The Nazi Plan*. This document contains several affidavits with exhibits, copies of which have been furnished to Defense Counsel. I ask the

Tribunal whether it believes it to be necessary that I formally read the affidavits at this time. Since the motion pictures themselves will be presented to the Tribunal and thereafter be in its permanent record, I respectfully submit that the reading be waived.

In the past 3 weeks the Prosecution has presented to this Tribunal a vast amount of evidence concerning the nature of the Nazi conspiracy and what we contend to be its deliberate planning, launching, and waging of wars of aggression. That evidence has consisted of documentary and some oral proof, but the Nazi conspirators did more than leave behind such normal types of evidence. German proficiency in photography has been traditional. Its use as a propaganda instrument was especially wed known to these defendants, and as a result the United States in 1945 captured an almost complete chronicle of the rise and fall of National Socialism as documented in films made by the Nazis themselves. It is from excerpts of this chronicle that we have compiled the motion picture now presented, entitled The Nazi Plan, which in broad outline sums up the case thus far presented under **Counts One** and **Two** of the Indictment.

The motion picture has been divided into four parts. This morning we first offer to the Tribunal Parts 1 and 2, respectively entitled "The Rise of the NSDAP, 1921 to 1933," and "Acquiring Totalitarian Control of Germany, 1933 to 1935." These will be concluded by 11:20, at which time we assume the Tribunal will order its customary morning adjournment. At 11:30 we shallpresentPart3, entitled "Preparation for Wars of Aggression, 1935 to 1939." This will be concluded shortly before 1 o'clock. At 2 p. m. we will offer

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11 Dec. 45

Part 4, 'Wars of Aggression, 1939 to 1944," and this will be concluded by 3 p.m.

Parts 1 and 2 now to be presented, enable us to re-live those years in which the Nazis fought for and obtained the power to rule all life, in Germany. We see the early days of terrorism and propaganda bearing final fruit in Hitler's accession to the Chancellery in 1933, then the consolidation of power within Germany, climaxed by the Parteitag of 1934, in which the Nazis proclaimed to the nation their plans for totalitarian control. It is in simple and dramatic form the story of how a nation forsook its liberty.

I wish again to emphasize that all film now presented to the Tribunal, including, for example, pictures of early Nazi newspapers, is the original German film, to which we have added only the tine in English. And now, if it please the Tribunal, we shall present Parts 1 and 2 of The Nazi Plan.

THE PRESIDENT: It may be convenient for the United States Prosecutor to know that the Tribunal propose to rise this afternoon at 4 o'clock instead of 5.

[The film, The Nazi Plan, was then shown in the court room until 1125 hours, at which time a recess was taken.].

COMMANDER DONOVAN: May it please the Tribunal, in the films which have just been shown to the Tribunal we have watched the Nazi rise to power. In Part 3 of our documentary motion picture now to be presented, we see the use they made of that power and how the German nation was led by militaristic regimentation to preparation for aggressive war as an instrument of national policy. Part 3, "Preparation for Wars of Aggression, 1935-1939; 1935-Von Schirach urges Hitler Youth to follow principles of *Mein Kampf*."

[The showing of the film then continued and at the end a recess was taken until 1400 hours.]

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11 Dec. 45

### Afternoon Session

COLANDER DONOVAN: This morning we presented photographic evidence of the history of National Socialism from 1921 to September 1939. We saw the dignity of the individual in Germany destroyed by men dedicated to perverted nationalism, men who set forth certain objectives and then preached to a regimented people the accomplishment of those objectives by any necessary means, including aggressive war.

In September 1939 the Nazis launched the first of a series of catastrophic wars, terminated only by the military collapse of Germany. It is this final chapter in the history of National Socialism that the Prosecution now presents.

May I again remind the Tribunal that all film presented and all German narration heard is in the original form as filmed by the Nazis.

[The showing of the film, part 4, then continued.]

COMMANDER DONOVAN: The Prosecution has concluded its presentation of the photographic summation entitled The Nazi Plan. We shall deliver for the permanent records of the Tribunal, as soon as possible, the original films projected today.

COL. STOREY: If the Tribunal please, just a brief announcement about the presentation that shall follow. The rest of the week will be consumed in the presentation of War Crimes and

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Military Legal Res	ources	Federal Researd Library o		
Home >> Military Legal Resources				
>> Nuremberg Trials >> Nazi	Find	in Military Legal Resources	V	go
Conspiracy and Aggression				



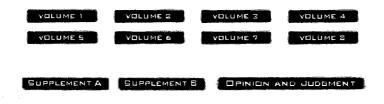
## **Nazi Conspiracy and Aggression**

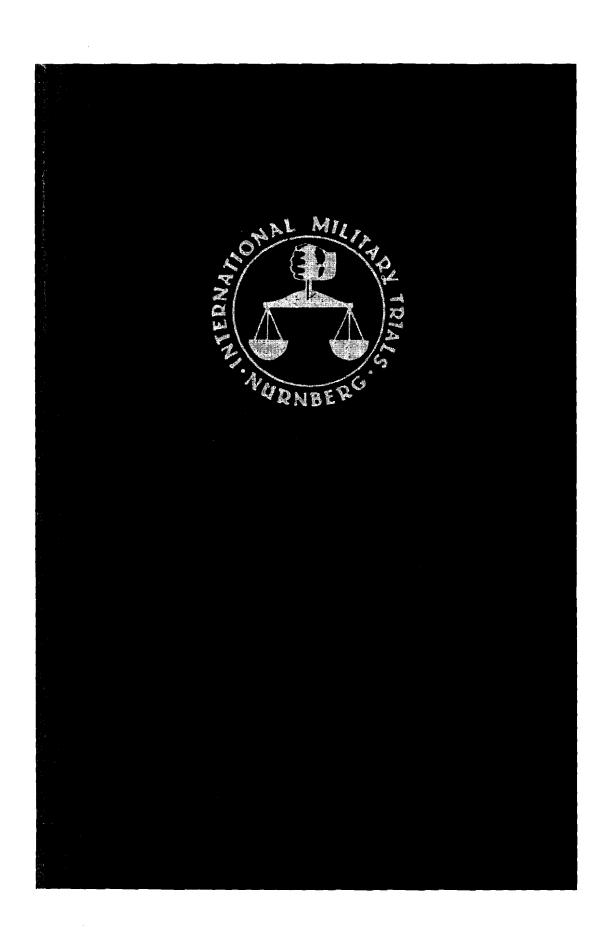
# Office of the United States Chief of Counsel For Prosecution of Axis Criminality

Nuremberg, Germany (1945-1946)

This eight-volume, 12-book series, also known as "The Red Series," is a "Collection of Documentary Evidence and Guide Materials Prepared by the American and British Prosecuting Staffs for Presentation before the International Military Tribunal at Nurnberg, Germany." The Red Series makes available an indexed sampling of the evidence used to support the charges made against the major Nazi war criminals in their trial at Nuremberg, Germany, 1945-1946. Volumes I and II serve as an overarching guide for the Red Series. They contain essays that summarize and link together the documents that follow. Volume II also contains a glossary along with short biographies of the German defendants, as well as summaries of the individual cases against them. Original volumes of this series may be found in the collections of the Library of Congress and The Judge Advocate General's Legal Center & School Library, U.S. Army, Charlottesville, Virginia. (Library of Congress Call Number D804.G42 A4; OCLC Number 3820704)

Adobe Acrobat Reader 6.0 or higher is required to read these documents. If you do not have this software on your PC, go to <a href="http://www.adobe.com/products/acrobat/readstep2.html">http://www.adobe.com/products/acrobat/readstep2.html</a> to download a free copy of the reader.





Ruthless proceedings should be taken against looters.

The arrests should be continued without restriction and exclusively by the State Police [Staatspolizei] stations.

Chief of the Security Police
/s/ Heydrich

#### PARTIAL TRANSLATION OF DOCUMENT 3054-PS

#### "THE NAZI PLAN"

A Documentary Motion Picture Composed Of Captured German Film

Part I The Rise of the NSDAP 1921-1933

Part II Acquiring Totalitarian Control of Germany 1933-1935

Part III Preparation for Wars of Aggression 1936-1939

Part IV Wars of Aggression 1939-1944

### OFFICE OF U. S. CHIEF OF COUNSEL APO 403 U. S. ARMY CERTIFICATE AND AFFIDAVIT

- 1. On 15 March 1945 I was on active duty with the United States Navy and it became my official naval duty to serve on the legal staff of the United States Chief of Counsel for the Prosecution of Major European War Criminals.
- 2. From then to the date of this affidavit, my duties and responsibilities have included the over-all direction and supervision, on behalf of the U.S. Chief of Counsel, of all photographic evidence to be used in the prosecution of such war criminals.
- 3. The motion picture entitled "The Nazi Plan" has been made under my direction in the course of my official duty as outlined above, with Commander E. Ray Kellogg, USNR, co-director in charge of all non-legal aspects of the making of the film.
- 4. This motion picture was made in Berlin, Germany, from August to November, 1945. The sources of the film are as follows:
  - a Universum—Film A. G. (UFA)
    - i Ufaton-Woche
    - ii Deuligton-Woche
    - iii Die Deutsche Wochenschau
    - iv UFA Auslandswochenschau
  - b Fox Tonende Wochenschau A. G.
  - c Paramount News (Germany)
  - d UFA Film Kunst

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- e Tobis Filmkunst
- f Reichministerium fur Volksaufklarung und Propaganda
- g Reichspropagandaleitung (RPL)

/s/ James B. Donovan Commander, USNR

Sworn to before me this 3rd day of December, 1945 /s/ Leonard Wheeler, Jr. Colonel, G.S.C. Army of the United States

# UNITED STATES NAVY DEPARTMENT WASHINGTON, D. C. CERTIFICATE AND AFFIDAVIT

- I, E. R. Kellogg, Commander, United States Naval Reserve, hereby certify that:
- 1. Since 6 September 1941, to the present date of 15 November 1945, I have been on active duty with the United States Navy.
- 2. On 1 May 1945, it became my official naval duty to locate, to cause to be located and to compile on behalf of the United States Chief of Counsel, photographic evidence to be used in the prosecution of major European Axis war criminals.
- 3. Under my command, military and naval units have selected prints of official German newsreels and other original German film. All of this film has been within the exclusive control of my command since the date when it came into our custody, and the motion picture which follows this affidavit has been compiled exclusively from excerpts of the German originals. Except for the titles in English which have been inserted, the entire picture is composed of such original German film. This includes any titles in German, any pictures of German newspapers, any special photographic effects and all narration in German.
  - 4. To the best of my knowledge and belief:
- a This film constitutes a true documentary representation of the individuals and scenes photographed and recorded;
- b The images taken have not been retouched, distorted or otherwise altered in any respect and are true copies of the original now held in United States custody;

c The English titles are based upon the material contained in the original German film.

/s/ E. R. Kellogg E. R. Kellogg Commander, USNR

Sworn before me in Berlin, Germany this 15th day of November 1945. /s/ James B. Donovan James B. Donovan Commander, USNR

### PART I THE RISE OF THE NSDAP 1921-1933

|Description of sequences, with translation of dialogue|

# 1. ALFRED ROSENBERG DESCRIBES THE EARLY NAZI STRUGGLES FOR POWER

(Rosenberg, in Nazi Party uniform, sits behind desk and relates story of Nazi struggles to 1933.)

Rosenberg:

"During this period a representative of a small party which had just been founded, called the German Workers Party, came to Dietrich Eckhardt, and thus the first connection was made between the future NSDAP and Dietrich Eckhardt. Adolph Hitler visited Dietrich Eckhardt and I was introduced to the Fuehrer. Since that time I have devoted myself completely to the NSDAP.

"I worked in the beginning with what later was to become the *Voelkischer Beobachter* and later, together with Eckhardt, took over the editing of this paper after it had been transferred to the ownership of the Party.

"During this time a short thesis was written, which nevertheless is significant in the history of the NSDAP. It was always being asked what points of program the NSDAP had and how each was to be interpreted. Therefore, I wrote the principal program and aims of the NSDAP, and this writing made the first permanent con-

nection between Munich, and local organizations being organized and friends within the Reich.

"In 1922 I took part in the march to Koburg. The next year brought the decisive political struggles in Bavaria and the rise of the Voelkischer Beobachter to a great fighting organ, until finally the development aimed at any kind of explosion. Naturally, the preparations were already made for this day. On the 8th of November, about noon-time. Adolph Hitler came to me in the editor's office and said to me: 'Rosenberg, this evening we will start. Let's go together into the Buergerbraeu.' Of course, I said 'yes,' and that evening we drove to the lecture of Mr. von Kaar-Adolph Hitler, his bodyguard and myself. At the entrance we met Scheubner-Richter, and when with a big crash the first machine gun rolled into the hall, we drew our pistols (which were 'off safety') out of our pockets and went through the assembly to the speakers' platform. There Adolf Hitler spoke to the assembly. Everything else is known in German history.

"By the next day, the treason was known to all and there came the march to the Feldherrnhalle, in which I participated walking behind the Fuehrer. After this first ill-fated attempt on the power of the Reich, I stayed in Munich and tried to keep the pieces of the party somehow together. There followed long years of fighting . . . "When the Voelkischer Beobachter was transferred to Berlin in 1933, I, too, moved into that city after a struggle which had lasted 14 years in Munich and Bavaria. both of which had become a second home to me. The move was made at just the right time. On the 30th of January, the Fuehrer took over the power in the Reich. He appointed me the head of the established foreign office of the movement, and one year later as his commissioner for the safeguarding of the entire intellectual and world-political schooling and education of the NSDAP and all its subordinate organizations."

 GOERING, NAMED PRUSSIAN MINISTER OF INTERIOR BY HITLER, OUTLINES HIS PROGRAM (February 1933).

(Goering, in civilian clothes, sits behind desk and promises to clean out both "Red" and "Black" opposition "with merciless decision and iron nerves.")

Goering:

"When I was appointed to the head of the Prussian Ministry of the Interior, I knew that I had to take over the toughest assignment, for here lies the key to the entire position of power. I am going to clean out with an iron broom and sweep out all those who hold offices only because of their Red or Black trend and are for the subjugation of all national aspirations. To make Prussia again the first and strongest bulwark of the German nation, that is my task. I shall execute this by the commitment of all my power, with merciless decision and with iron nerves."

### 7. ELECTION DAY IN BAVARIA (5 March 1933).

(Nazi newspaper headlines.) (Torchlight parade of SA.)

(SA men in uniform patrol streets, on foot and in trucks, armed with rifles. In front of Trade Union House SA have set up a machine gun. Nazi newspaper headlines, announcing great victory.)

9. MEETING OF REICHSTAG AT WHICH HITLER AND HIS CABINET RECEIVE PLENARY POWERS OF LEGISLATION (24 March 1933).

(Meeting in Reichstag at which "emergency" dictatorial powers were given to Hitler after Reichstag fire. Hitler delivers speech; Goering presiding as President of Reichstag. Wild applause.)

Hitler:

"With the breach of the promises made to us in the 14 points of Wilson, a time of never-ending disaster began for Germany, that is, for the working German people. Huge are the tasks of the national government in the sphere of the economic life. Here only one law shall rule everything else:

"The people do not exist for the economy and the economy does not exist for capital, but rather, capital serves the economy and the economy the people."

#### PART II

# ACQUIRING TOTALITARIAN CONTROL OF GERMANY 1933-1935

# 10. OPENING OF OFFICIAL ANTI-SEMITIC CAMPAIGN (1 April 1933).

(Crowds in Berlin as Goebbels delivers anti-Semitic harangue concerning the boycott, which he describes as "well-disciplined". SA men in trucks go through streets shouting anti-Semitic slogans. Stars of David, and posters urging "Boycott Jews", on windows of Jewish stores, all guarded by SA men.)

Goebbels:

"My fellow country men and women. At ten o'clock this morning the boycott began. It will be continued until the hour of midnight. It is being executed with a momentum like that of a blow, but at the same time with an impressive order and discipline. Now they have found a place of refuge in Paris and London and New York. To our party and to our Fuehrer 'Heil'".

Poster:

"Germans, Boycott!

Don't buy in Jewish stores!"

SA Chorus (on truck):

"Germans, liberate yourselves from the tyranny of the Jews!

"Germans, boycott, don't buy in Jewish stores!"

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#### 11. FOREIGN PRESS CONFERENCE (April 1933)

(Goebbels and Hitler, both in civilian clothes, address foreign correspondents after anti-Semitic outbreaks. Goebbels declares Nazi "revolution" will "not stop at anything" while Hitler says: "That as in every struggle such an historical event is accompanied by regretful happenings here and there, is only natural.")

Goebbels:

"The national revolution in the course of which we find ourselves today is an elementary event, which only came unexpectedly for one who lived apart from our times. He who has co-operated in creating this event has hoped for it. It started on 30 January of this year, and it is not going to come to a stop before it has inundated the entire life of the German community and has permeated it even in its very last phases. This revolution is not going to stop at anything!"

Hitler:

"Gentlemen! Since the 30 of January a revolution has taken place in Germany, which in history will justly be called the national revolution. Due to two reasons this event happened in this form, which is known by us:

- "1. The rape of the German inner as well as outer life, which was initiated in November 1918, had to become unbearable for any length of time, and therefore had to lead to a change.
- "2. The equally unwise as well as merciless subjugation and elimination of the national element which requested a change, logically had to lead to accumulation of these powers, and therefore, in the end, to a powerful revolution. That as in every struggle such an historical event is accompanied by regretful happenings here and there is only natural."

### 12. THE BURNING OF THE BOOKS (10 May 1933).

(SA men and students, carrying Nazi banners, parade past fire, throwing books in flames. Goebbels speaks to crowd. All sing "Germans. to arms".)

German Commentator: "In Berlin as well as in other German university towns, un-German and improper books were gathered and burned by students—the bonfire on the square in front of the Berlin Opera—Reichsminister Dr. Goebbels speaks to the youth.

Goebbels:

"My German men and women! The era of the over-pointed Jewish intellectualism has now finished and the success of the German revolution has also opened the road for the German way. The German to come will not only be a man of learning but rather a man of character and to this we want to educate you. To have the courage, while still young, to look at life, into its merciless eyes. To forget the fear of death in order to regain reverence for death, that is the task of this young German generation and therefore, you do well to entrust to the flames the demon of the past at this hour of midnight. This is a strong, great and symbolic action, an action which is to be documented before the whole world. Here the spiritual foundation of the November-Republic is falling to the ground, but out of its rubbles there will victoriously rise the Phoenix of a new spirit!"

# 14. REICHSTAG ADDRESS ON DISARMAMENT (17 May 1933).

(Wild cheering in Reichstag as Hitler declares "in name of German people and German government" that Germany has disarmed "beyond reason".)

Hitler:

"The following declaration I am making in the name of the German people and the German government: Germany is disarmed! She has fulfilled all obligations of the peace treaty, far beyond the limits of justice, yes, beyond any trace of reason."

### 15. YOUTH MEETING IN THURINGIA (18 June 1933).

(Hitler, surrounded by SA, addresses huge Youth rally, declares he is reducing unemployment and will continue to do so. All give Nazi salute.)

Hitler:

"That which is standing here is no empty phrase. This is a reality of blood and flesh. We now reign for a little more than 4 months, and we can proudly say that the number of unemployed has been reduced by about 1,200,000. Heil! Give us time! In 4 months we have eliminated 1,200,000. We shall keep on working and not rest until we have attained the goal."

# 16. SWASTIKA BECOMES NATIONAL SYMBOL (9 July 1933).

(Hitler at huge open-air rally, proclaims unity of NSDAP and state, declaring that swastika has become "symbol of the German people and the Reich". All give Nazi salute.)

Hitler:

"My fellow German men and women: On the 30th of January the die was cast in Germany, and I don't believe that the opponents who laughed then, are still laughing today. We are living witnesses, that never again the era of the corrupt party occurrences will reappear. Since that day our flag has risen ever higher from week to week, as the symbol of the German people and Reich. Sieg Heil!"

### 17. FIFTH PARTY CONGRESS (September 1933).

(Increased numbers at congress are evident. Hess, Streicher, and other party leaders are present as Hitler speaks to formations of party organizations, in uniform.)

Hitler:

"But the most precious possession in this world is our own people and for this people and because of this people we will struggle and we will fight, never weaken and never tire and never hesitate and never despair."

#### 1934

19. OVER RADIO NETWORK HESS ADMINISTERS OATH OF ALLEGIANCE TO MORE THAN 1,000,000 LEADERS OF NSDAP AND ALL AFFILIATED ORGANIZATIONS (25 February 1934).

(Hess stands on swastika-draped balcony with Schirach, Ley, Rosenberg, etc. behind him; SS and SA formations around him; he recites oath of personal loyalty to Hitler and all repeat it after him, with arms outstretched in Nazi salute.)

Hess:

"On the occasion of the anniversary of the day of the publication of our program, you shall give in unison the oath of fidelity and obedience to Adolf Hitler and thereby emphasize in this form before the whole world what you long hence have considered as self-explanatory:

"'I swear to Adolf Hitler and to the leaders appointed by him for me, unbreakable fidelity and unquestioned obedience.'

"The taking of an oath, with the largest number of participants in history, has occurred. To the Fuehrer, Sieg Heil!"

# 20. HESS RE-AFFIRMS HITLER'S FAITH IN SA AFTER ROEHM PURGE (July 1934).

(Hess, in party uniform, reads speech as Hitler's deputy, and declares that old unity has been restored.)

German

Commentator:

"Rudolf Hess, the representative of the Fuehrer, has made a speech in Koenigs-

berg which is very important for domestic as well as foreign policy:

Hess:

"I am giving a warning with the same pointedness with which, at the time of my speech in Cologne, I warned those playing with the thought of a second revolution. I am warning all those who believe that they can defame the SA today. As loyally as the veteran SA man stands by the Fuehrer, just as loyally does the Fuehrer stand by his old SA. The Fuehrer has punished the guilty ones. Our relation to the SA is once more the same."

### 21. 6TH PARTY CONGRESS EXCERPTS FROM OFFICIAL PARTY FILM "TRIUMPH OF THE WILL"

4-10 September 1934

a Original

German titles:

"Triumph of The Will"

German titles:

"The Document of the Reich Party Day

1934"

German titles: German titles:

"Executed by Order of the Fuehrer" "Produced by Leni Riefenstahl on Septem-

German titles:

ber 5, 1934" "Twenty Years after the outbreak of the

German titles:

World War"

"Sixteen years after the beginning of the

German titles:

German sufferings" "Nineteen months after the start of the

German re-birth"

German titles:

"Adolf Hitler flew again to Nurnberg to hold a military review of his loyal subjects"

b (Hess opens Party Congress in hall, declaring to Hitler, "You are Germany. When you act, the nation acts; when you judge, the people judge." To be seen in foreground are Japanese ambassador and other diplomats, General Staff Officers, Streicher, Goering, Raeder, Bormann, Ley, Goebbels, etc. Hitler clasps Hess' hand.)

Hess:

"I open the congress of the 6th party day in reverent memory of General Field Marshal and President of the Reich von Hindenburg, who has passed into eternity. We remember the Field Marshal as the first soldier of the Great War and therewith we remember also our comrades killed in action. I extend greetings to the high representatives of foreign countries, who do honor to the party by their participation in this convention. The movement extends its greetings in sincere comradeship especially to the representatives of the armed forces, now under the command of the Fuehrer. My Fuehrer! Around you are placed the flags and banners of this National Socialism. Only then, when their cloth will have become decayed, will the people be fully able to understand the greatness of our time while reviewing the past; only then will they be able to comprehend what you, my Fuehrer, mean to Germany. You are Germany. When you act, the nation acts; when you judge, the people judge. Our gratitude for that is the vow to stay with you through good and bad days, come whatever may. Thanks to your leadership, Germany will achieve its goal, of being a homeland. Of being a homeland for all Germans throughout the world. You were our guarantee of victory. You are our guarantee of peace."

c (Party leaders in uniform, each concerned with a sphere of life in Germany, deliver brief speeches on the progress of totalitarian control: Rosenberg (spiritual training and education); Dietrich (press); Todt (industry); Reinhardt (finance); Darré (agriculture); Streicher (politics and anti-semitism); Ley (labor); Frank (law); Goebbels (party and propaganda); Hierl (labor service).)

Rosenberg:

"Such is our unshakable belief in ourselves; such is our hope in the youth destined, to-day as it was in days gone by; to continue the work—the work which was founded during the stormy years of the revolt of 1918 in Munich and which is embodied already today in world-historical significance by the entire German nation."

Dietrich:

"The truth is the foundation on which the power of the press stands or falls. That the truth about Germany be reported, that is the only demand we make of the foreign press."

Todt:

"Construction of the Reichsautobahnen has been started in 52 localities of the Reich. Even though the work is still in its beginnings, there are today already 52,000 men employed at the construction sites, in industry, and in mines or otherwise within the frames of this project which has just been started."

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Reinhardt: "Wherever we look, everywhere building

projects are under way. Everywhere values are being improved and newly created. Within one year, lively activity prevails everywhere and lively activity will prevail

also in the future."

Darré: "The preservation of the strength of our

farmers is our first responsibility toward the flourishing and development of our industry, toward the German domestic trade

and the German exports."

Streicher: "A people which disregards the purity of

its race will perish.

Ley: "All our work must be governed by a single

thought — that of making the German worker an upright and proud member of the people, who possesses equal rights."

Frank: "I can only say as leader of German law instruction, that our highest leader is also

instruction, that our highest leader is also our highest judge, since National Socialistic justice is the foundation of the Na-

tional Socialistic state."

Goebbels: "May the bright flame of our enthusiasm

never die."

Hierl: "The German people are ripe today in mind

and soul for the introduction of general, equal compulsory labor service. We await

the Fuehrer's order!"

d (Hierl presents 52,000 uniformed men of Labor Service. They are seen entering and leaving in military formations with spades on shoulders and carrying out military orders given by leaders. All chorus that they "did not stand in the trenches, nor in the rumbling fire of grenades, and yet we are soldiers. We are the youthful might of Germany..." Hitler speaks. All march out with spades on shoulders.)

Hierl: "My Fuehrer! I am presenting for inspec-

tion 52,000 men from the Labor Service."
"Heil! men from the Labor Service!"

Hitler: "Heil! men from the Labor Service!"
Chorus "Heil! My Fuehrer! Shoulder spades! Or-

From Field: der spades!"

Chorus of men "Here we stand; we are prepared and will from the carry Germany into a new Era. Ger-

Labor Service: many!"

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Replu:

One man from the

"Comrade, where do you hail from?"

Labor Service:

"From Friesia."

One man from the Labor Service:

"And you Comrade?"

Replies:

"From Silesia; from the Waterkant; from the Black Forest; from Dresden; from the Danube; from the Rhine; and from the

Saar."

Chorus:

"One People, one Fuehrer, one Reich, Ger-

many."

"We did not stand in the trenches, nor in the rumbling fire of grenades, and yet we are soldiers, and are soldiers anyhow . . . are our . . . real shovels, pickaxes, spades." "We are the youthful might of Germany, as

once upon a time at Langemark."

Hitler:

"My men of the Labor Service! You are before me for the first time on roll call, and thereby before all the people of Germany. You represent a great idea and we know that work will no longer be a concept which divides the millions of our fellow citizens, but will be a uniting factor; and that no one, who sees in manual labor a kind of work inferior to any other kind of work, will be left in Germany. The entire nation will follow your path; and I know, that as you proudly offer your services to Germany, so Germany in proud happiness will watch you, its sons, march by." "People to arms."

Song:

e (SA in uniforms gather at night in torch-light parade. Lutze (Chief of Staff of SA) pledges all to fidelity to Hitler.)

Lutze:

"Comrades! Many of you, who stand here tonight, still remember me as an SA-man, who marched in the rank and file during the first years of the movement; and just as I was then an SA-man so am I today still an SA-man. We SA-men always knew one thing: Fidelity to the Fuehrer, and battle for the Fuehrer."

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f (Hitler Youth enter stadium, in formation and in uniform. Hitler, Goebbels, Streicher, Hess and General Staff officers on platform as Schirach hails Hitler as "the leader of the German youth." Hitler urges youth to be "hard" and to "steel itself". All give Nazi salute.)

Schirach:

"My Fuehrer, my Comrades! We again have lived to see the hour which has made us proud and happy. Upon your command, my Fuehrer, the youth stands before you, a youth that does not know class difference or caste. The young generation of our people is forming itself according to your principles; because you exemplify the highest degree of unselfishness in our nation, these youths also want to be unselfish; because you embody loyalty for us, they too want to be loyal. Adolf Hitler, the leader of the German youth, will have a word."

Hitler:

"My German Youth! After one year I can greet you here again. You are today here in this shell only a section of that which is outside of it, all over Germany, and we want now, that you, the German boys and girls, take up into yourselves all that which we expect from Germany in the future. We wish that this people will not be softened in the future but that it can be hard, and to that end you must steel yourself while you are young. You must learn to endure privations without ever breaking down, for whatever we may create today or whatever we do, we will perish, but in you Germany will continue to live and when there is nothing left of us, you will hold in your fists the flag that we once pulled out of nothingness. And I know that it cannot be otherwise, because you are flesh of our flesh, and blood of our blood, and in your young brains burns the same spirit that masters us. You can't be anything else but united with us and as today the great columns of our movement march victoriously through Germany, I know you

will attach yourselves to these columns. We know that Germany lies before us, that Germany marches with us, and that Germany follows us."

g (Political leaders, in uniform and with Nazi banners, parade. Hitler addresses them.)

Hitler:

"A year ago we met on this field for the first time. This is the first general roll call of the political leaders of the National Socialistic Party. Here are assembled 200,000 men, answering only to the call of their hearts and the call of their fidelity. The state has not created us, but we are creating the state for ourselves. The movement lives and stands firm as a rock and as long as even one of us breathes, he will lend all his strength to this movement and will stand up for it. As in the years which lie behind us, so on this day, let us vow to think every hour, every day only of Germany, of the people and of the Reich, of our German nation, our German people, Sieg Heil, Sieg Heil!"

h (SA and SS assemble. Hitler, with Lutze on one side and Himmler on other, refers to Roehm purge and then declares that he is "delivering Germany over to" the SA and SS.)

Lutze:

"My Fuehrer! Just as we fulfilled our tasks and our duties in former times, so we shall in the future, await only your commands. We comrades know nothing else but to carry out the command of our Fuehrer and to prove that we have remained the same. To our Fuehrer, Adolf Hitler, Sieg Heil!"

Hitler:

"SA and SS men! Several months ago, a black shadow passed over the movement. The SA has as little as any other institution in the party to do with this shadow, and only a madman or a deliberate liar can think that I or anyone else ever had the intention to dissolve that which we have

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built up during long years. No, my comrades! We stand firmly together for one Germany and we must remain firmly united for this Germany. I deliver Germany to you, in the conviction that I am delivering it into the most trustworthy hands in Germany, for during past times you have a thousand fold proved your loyalty to me and it cannot be otherwise during the days ahead of us. It shall not be otherwise. And so I greet you as my old, faithful SA and SS men. Sieg Heil."

i (Military exercises; cavalry, armored cars, artillery; Goering in Army uniform, with General Staff officers.)

j (Parades through Nurnberg streets, before Hitler. SA goosestep in formation. Transportation Corps carry spades on shoulders. Wehrmacht, with Nazi armbands; General Staff on review stand. Luftwaffe volunteers with Goering at head. SS in uniform, led by Himmler, goose-step in formation. Seen on review stand are Hess, Ley, Streicher, Raeder, etc.)

k (Closing of Congress. Streicher, Hess, Goering, Himmler, Frick, Frank, Schacht, etc. are seen. Hess introduces Hitler, who declares that all "decent" Germans must become Nazis. Hess leads Congress in hailing Hitler.)

Hess:

"The Fuehrer speaks."

Hitler:

"The sixth party anniversary of the movement is nearing its end. The German people is happy in the realization that the constant change of appearances has now been finally relieved by a permanent pole; who, feeling and recognizing himself as the carrier of its best blood, raised himself to the leadership of the nation. Always only a part of a people will consist of fighters. More is being required from them than from the remaining millions of racial comrades. For all the future the party will be the political selection of leadership for the German people. It will be unchangeable in its teachings, hard as steel in its organization; its tactics will be flexible and

adaptable, but in its entirety it will be like one arm. But the aim must be that all decent Germans become National Socialists. Only the best National Socialists are party members. Only then if we in the party through the actions of all of us have achieved the highest embodiment of the National Socialist idea and being, will it be an eternal and indestructible pillar of the German people and the German Reich. Then, one day the wonderful, glorious army of the old, proud fighters of our people will have at its side the no less tradition-bound leadership of the party, and then both these institutions will together educate and stabilize the German people and carry on their shoulders the German state, the German Reich."

Hess:

"The party is Hitler. But Hitler is Germany, as Germany is Hitler. To Hitler, Sieg Heil!"

#### PART III

#### PREPARATION FOR WARS OF AGGRESSION 1935-1939

#### 1935

### 22. SCHIRACH URGES HITLER YOUTH TO FOLLOW PRINCIPLES OF MEIN KAMPF.

(Torchlight meeting of uniformed Hitler Youth, with fire burning in background. Schirach delivers speech urging youth to draw their fighting strength from Mein Kampf. Chorus sings "Today Germany, Tomorrow the World.")

Schirach:

"Now, my comrades you have arrived here at the end of your march. Why does this huge march of allegiance of young Germany end in Landsberg? Here on this spot, year after year, it must be explained again and again to the youth of our people, that it was at one time possible for our people to imprison Germany's greatest son here. Out of the solitude of his cell the Fuehrer once gave us the book *Mein Kampf*. In the

future you shall draw the strength from this book to conduct your fight, the fight of the German people, the fight of the young generation, the fight of the Germany of tomorrow. And when the banners of the youth return home from here tomorrow, then everything you have experienced during those long weeks of your march will continue to live on forever, indestructible as the symbols which are attached to our flags. To our Fuehrer, our beloved Fuehrer Adolf Hitler, Sieg Heil, Sieg Heil!"

### 23. GOERING ANNOUNCES RE-ARMAMENT OF GERMANY (March 1935).

(Goering, in uniform, declares that "The Fuehrer has again armed us". Background of warships, planes, tanks, Hitler inspecting troops, and Hitler Youth montage showing how Hitler Youth have been trained as soldiers. Hitler speaks with reference to universal military service proclaimed on 16 March 1935.)

Goering:

"Only that nation is capable of this task whose idea of unity is strong enough to start and to preserve in each individual fellow-German the will for complete selfsubordination to the community, even to the point of self-sacrifice. Today, the rebuilt German National Guard rises again on the strong foundation of the National Socialistic ideology. The gap which had split apart the German people has been closed by the Fuehrer and he has wrought into one the mixture of ideas which differed and which were conflicting: The parties, the classes, property, the religions. The Fuehrer has given us back our arms, because he loves his people and the security of Germany is close to his heart. It is the historical mission of the front line soldier, Adolf Hitler, to create a strong army."

Hitler:

"By this act of fidelity Germany has regained her honor and has found again her faith; has overcome her great economic crisis and has finally initiated her new cultural rise. I believe that I may state this before my conscience and my God. Now I beg the German people to strengthen me in my belief and furthermore, by its power of will, to strengthen my own will to stand up courageously for its honor and freedom and to be able to create an economic bulwark; to strengthen me especially in my fight for an armed peace."

#### 24. 7TH PARTY CONGRESS (10-16 September 1935).

a (Meeting of Reichstag in Nurnberg. Hitler declares necessity of return of Memel to Germany, then introduces Goering.)

Hitler:

"But especially on account of this the German people follow with still greater unrest the events in Lithuania. Years after the peace treaty the land of Memel was taken away from Germany during the quiet of peace. A great nation has to keep on witnessing how her blood relations, who have been attacked and separated from the Reich, against all laws and provisions of agreements, are being treated worse than criminals in normal states. But their only crime is that they are Germans and want to remain Germans.

"Now I suggest to the Reichstag the passing of the laws which will be read to you by fellow party member Goering, President of the Reichstag. The first and second laws repay the entire debt to that movement under whose symbol Germany has regained her freedom. The second law is the attempt of the lawful regulation of a problem which, in case it should fail again, would have to be transferred by law to the National Socialist Party for final solution. Behind all these three laws stands the party, and with it and behind it stands the German nation."

b (Goering reads "Nurnberg Laws"; swastika formally made national flag; Jews denied citizenship, and marriage of citizens to Jews forbidden. Hess, Neurath, and Frick are seen. Wild cheering.)

Goering:

"The colors of the Reich are Black-White-Red; article two: The Swastika flag is the Reich and National Flag. At the same time it is also to be the merchant flag. "A citizen of the Reich is only that person who is of German or of the same kind of blood and who proves by his behavior that he is willing and has sworn to serve the German people and the Reich faithfully. "Marriages between Jews, and German citizens or persons of the same kind of blood, are prohibited.
"To our Fuehrer, the saviour and creator, Sieg Heil!"

c (Review of Hitler Youth in formation before Schirach, Hitler and party leaders. Hitler urges them to be "tough as leather, hard as Krupp steel". Hess stands behind him.)

German
Commentator:

"The Fuehrer speaks to his youth."

Hitler:

"In our eyes the German youth of the future has to be clean-cut, fast as greyhounds, tough as leather, and hard as Krupp steel. We go down our road and we do not want to cross the road of anybody else. We are a strong community, pledged to each other. Would only that the others let us go our road in peace! The only condition we have to make, above our love of peace, is to harm nobody but at the same time to tolerate no harm from anybody else."

(Review of Wehrmacht maneuvers: planes, tanks, armored cars, artillery, cavalry, all in large numbers.)

(Hitler is presented with symbolic medieval sword of Emperor of early German Empire.)

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#### 1936

26. RE-OCCUPATION OF RHINELAND (7 March 1936). a (Troops and artillery pour across Rhine.)

German
Commentator:

"German troops reoccupy their former peace time garrisons in the unprotected zone."

"Tremendous enthusiasm in Duesseldorf."

b (Crowds, in party uniforms and waving Nazi flags.)
c (Troops on guard at Rhine.)

# 27. MINISTER NEURATH EXPRESSES CONFIDENCE ALL GERMANS WILL VOTE APPROVAL OF HITLER'S POLICIES (29 March 1936).

(Neurath at polling booth on day of plebiscite. Gives Nazi salute, then speaks. Bormann, Frick, Hess, and Goebbels also vote, Frick making brief speech appealing for support of Hitler.)

Neurath:

"I am convinced that today the German people will back up our Fuehrer and Ger-

many 100% with a solid 'Yes'."
"Reichsminister Dr. Frick and wife vote."

Commentator:

Frick:

German

"On the 29th of March let each German man and each German woman fulfill their

duty and back up liberty and peace."

German

"Reichsminister Dr. Goebbels and wife vote."

Commentator: Goebbels:

"I am wholly convinced that today the whole German people will stand as one be-

hind the Fuehrer."

# 28. RIBBENTROP, AMBASSADOR TO GREAT BRITAIN OUTLINES NAZI FOREIGN POLICY (April 1936).

(Ribbentrop, behind table, with party emblem in lapel. Declares that Germany "once and for all" has restored its sovereignty and will never allow this sovereignty to be discussed again. Also, that Germany wants equality—and peace. Refers to Hitler victory in recent plebiscite.)

Ribbentrop (in English):

"The German Chancellor has placed before the world his real peace plan. In doing so, he can rightly say that this plan for the consolidation of Europe is proposed by 90%—by 99%—of Germany; that is, the entire German nation, a nation which once and for all has restored its sovereignty and which will never allow this sovereignty to be discussed again. But also a nation which wants nothing but freedom, equality and peace.

"Germany is convinced that also the British people, as well as the French people, want this new peace in Europe, based on a spirit of conciliation among equal sovereign powers, to be established as soon as possible."

### 29. ADDRESS TO HITLER YOUTH AT POST STADIUM (1 May 1936).

(Hitler Youth rally, with Schirach, Hess, SS, SA, General Staff officers, etc. Mass singing of marching songs.)

Schirach: Hitler:

"My Fuehrer! I report your youth to you."
"Heil! We cannot use a generation of weaklings and of spoiled children. What we need are boys and girls who later on will be strong men and courageous women. Thus for us, this first of May is a great military review of the present and also a review of the future. The millions of men and women parading today are the present; and you, my boys and my girls, are the future, and we are reviewing you today and we are proud to see you. Sieg Heil"

# 30. ADDRESS TO KRUPP MUNITIONS PLANT WORKERS (28 May 1936).

(Hitler speaks from train chassis to workers, telling how important their work is and pleading that they not talk about it but only act. Shots of large guns being made. Himmler and Ley seen on platform. General Staff officers in background.)

Hitler:

"My fellow German men and women, German Workers! During the past three years you have proven that we are one people which can exist alongside the others, and therefore I ask you, German people, to

judge. I do not subject myself to the others. The world has no right to judge me. I subject myself to you. You judge me, whether my work has been done right, whether you believe that I have been industrious, that I used my time wisely in the service of my people. And therefore you entitle me to say: 'That, which I am now declaring here, is the declaration of Germany, that is, the declaration of the German people.' Let there be no talk about your work; just act."

#### 1937

#### 32. ARMED FORCES RECEIVE NEW FLAGS (April 1937).

(Raeder, General Staff officers, etc. review long columns of Wehrmacht, Brownshirts, Navy, with cavalry, artillery, and tanks.)

# 33. GERMAN SAILORS KILLED IN SPANISH CIVIL WAR BROUGHT HOME ON THE "DEUTSCHLAND".

(The ship, its crew and swastika-draped coffins are seen. Admiral Raeder with Hitler. Address by Admiral, stating that these dead set a shining example.)

German
Commentator:

"The 31 dead sailors of the (pocket) battleship 'Deutschland' are being buried, next to the dead of the battle of the Skagerag, by order of the Fuehrer. The entire German people mourns with the mothers and the wives for the victims of the Bolshevist attack."

Raeder:

"Rarely, in a very long time, has the German people uttered such a common cry of anger, which originated so far down in the depths of their souls, as the one which was uttered after the crime of Ibiza.

"May they always be a shining example of supreme sense of duty and readiness for self-sacrifice. May they forever be an emphatic warning to keep on working and fighting in the sense, and according to the will, of our Fuehrer. On the occasion of his first inspection of the newly commissioned 'Deutschland' in May, 1933, he saw when, in the crew's quarters, the motto of the great king was put up: 'It is not necessary that I live, but that I do my duty'."

#### 34. NINTH PARTY CONGRESS (6-13 September 1937).

a (Parades of party and army formations. Transportation Corps now goose-step, with spades on shoulder. Labor Service perform military exercises, with spades on shoulder, as crowd applauds. Raeder, Hess are seen.)

Hierl:

"38,000 workmen have assembled for the

celebration."

Hitler:

"Heil, my workmen!"

Labor Service:

"Heil, my Fuehrer!"

German

Commentator:

"Men of the police force, among them 160 bearers of the Blood-Order and the Golden Party Medal, for the first time are marching in their new parade uniforms, which the Fuehrer has consecrated and donated to them."

b (Hitler lays cornerstone of Nurnberg Stadium and "hopes it will be a continuing symbol of the German Reich". Montage of stadium.)

German

Commentator:

"The ceremonial laying of the cornerstone of the largest stadium of the world, ca-

pacity 406,000 spectators."

Hitler:

"Germans! In this moment of history, as I am laying the cornerstone of the German stadium, I am fulfilling three burning wishes:

"1 May this enormous monument be completed for the fame and the pride of the

German people.

"2 May it be the eternal witness of a powerful nation and Reich, united by National

Socialism.

"3 May it be a reminder for all time, for all German men and women, and may it lead them to that strength and beauty which is the highest expression of the nobility of a real freedom. I hereby open the National Socialistic Competitive games in Nurnberg for the year 1937."

c (Wehrmacht parade.)

d (Review of Hitler Youth, by Hitler and v. Schirach.)

Hitler (later):

"Heil my youth!"

"Heil my men!"

Replies:

"Heil my Fuehrer!"

e (Party formations on field. v. Neurath, Raeder, Jap, Spanish and Italian representatives are seen. Singing of Horst Wessel hymn.)

German

"The Fuehrer walks to the monument of

Commentator:

the dead of the movement."

"The Blood flag."

f (Review of all units and Wehrmacht parading. Goering, Himmler, General Staff, Ley are seen.)

#### 1938

# 35. HITLER ADDRESSES REICHSTAG ON REARMAMENT (20 February 1938).

(Hitler in Reichstag, Goering presiding and most of Cabinet present, declares necessity of rearming; that it is possible for the nation to continue to do so, under the leadership of the Nazi party. Wild applause. Montage of planes, warships, guns, munition factories.)

Hitler:

"That day, when I entered the house on the Wilhelmplatz as the chief of the biggest German party of opposition, and when I left it as the Fuehrer and Chancellor of the nation, was a turning point in the history of our people of that time, now and for the whole future. If today Germany has been saved, then the German people only have to thank its own leadership and its own work. To this, the foreign countries have not contributed anything.

"The German standing army has been assembled; a powerful German airforce protects our homes; a new might at sea protects our coast. During the gigantic rise of our general production, it was possible

to carry on a program of re-armament without parallel.

"Each institution of this Reich stands under the command of the highest political leadership. And all institutions of this Reich have sworn, and are united in the resolution, to represent National Socialist Germany, and defend her to the last breath if necessary."

#### 36. ANSCHLUSS (12-13 MARCH 1938).

a (Nazi newspaper headlines reviling Schuschnigg; then announcing that Seyss-Inquart has appealed to Hitler to send troops.)

Headlines:

Voelkischer Beobachter:

"Conference of the Fuehrer and Dr. Schuschnigg on the Obersalzberg!"

Der Angriff

"Schuschnigg's big fraud!"

Der Angriff

"Schuschnigg no longer master of the situation!"

"Bolshevist chaos threatens in Vienna."

Der Angriff

"The first victim of the deceit!"

"The resignation of the Bundeschancellor demanded!"

Voelkischer Beobachter

"German-Austria saved from the chaos!" "Seyss-Inquart asks the Fuehrer to send German troops!"

- b (German troops cross border, planes overhead.)
- c (Swastika leaflets being distributed.)
- d (Crowd in Vienna square.)
- e (Hitler arrives and addresses crowd. Planes overhead.)

Seyss-Inquart:

"I proclaim to the whole world that at this hour Adolf Hitler has entered the castle of the old Reich's capital, the guardian of the crown of the Reich, as the Fuehrer and Reichschancellor."

Hitler:

"During a few days a revolution has taken place within the German community, which we may be able to see today, but the full meaning of which only the generations still to come will be able to see. I know that the old Eastern Province [Ostmark] of the German Reich will do justice to its new tasks, just as it solved and mastered the old ones. As Fuehrer and Chancellor of the German nation of the Reich before German history I now lead the incorporation of my homeland into the German Reich. To Germany, our new member, the National Socialist Party and the Wehrmacht of our Reich, Sieg Heil!"

f (Hitler inspects units of Austrian Army. Keitel is seen.)

### 38. HITLER ADDRESSES REICHSTAG ON THE ANSCHLUSS (18 March 1938).

- a (Reichstag interior, Goering presiding.)
- b (Crowds in other halls and on streets, before portraits of Hitler, listening over radio.)
- c (Reichstag audience; Goering presides. Seyss-Inquart, Frick, Funk, Sauckel, Ribbentrop, Hess, etc. are seen. Great applause.)

Hitler:

"A few weeks ago when I had occasion to speak to you, you received the report about the reconstruction work of the National Socialist State in the period of the last five years. Within the framework of the political problems of that report I have also discussed that question which could be overlooked only by certain European persons who ignore again and again the danger of the situation. But it is self evident, that if a state like Austria, which has been created by force and which is prevented by force from uniting herself with her motherland is doomed to die if for no other than purely economic reasons, then also its remaining alive is possible only by the permanent use of force against the natural instinct of self preservation of a people.

"But what power of the world would take it lying down, when millions of relatives of their own people are being treated in the worst manner in front of its very gates? I told Mr. Schuschnigg in no uncertain terms, that there is no person with any national decency and honor who does not long for and work for this union with the German people. In this sense I suggested to him a way, which should have led to a solution. But I called Mr. Schuschnigg's attention to the fact, that this would be the last attempt on my part, and that I am determined to protect the rights of the German people in my homeland with every means (which only have always then been left in this world, when human understanding rejects normal justice) if this attempt should fail. That this idea was correct is proven by the fact that during the execution of the intercession which became necessary, within three days all of the homeland hastened to meet me without the firing of a single shot, and without the loss of a single victim.

"Besides that I am happy to have now become the executor of the highest commission. What prouder satisfaction for a man can there be in this world than to have led the people of his homeland into the greater community of people? One people, one Reich, German!"

40. TENTH PARTY CONGRESS (5-12 September 1938).

- a (Party formations reviewed by Hitler and Hess.)
- b (Schirach introduces Hitler to Hitler Youth.)

Schirach:

"My Fuehrer! I report to you 5,000 BDM girls and 52,000 Hitler boys, assembled for review!"

1

Hitler:

"Heil, my youth!"

"Heil, my Fuehrer!"

Chorus:

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- c (Parade of troops; honoring of World War dead.)
- d (Formations of SA and SS in uniform. Reviewed by Hitler, Goering.)
  - e (Formations of political leaders in party uniform.)
  - f (Troops pass in review.)
- g (Labor battalions do military manual of arms with spades, crowd applauding each maneuver.)

# 41. HITLER DECLARES HIS POLICY WITH RESPECT TO SUDETENLAND (26 September 1938).

a (Interior of Sports Palace, with slogans re Sudetenland on walls.)

Headlines:

Voelkischer Beobachter

"Konrad Henlein's Proposal for a German-

Czech balance."

Voelkischer Beobachter

"Red military dictatorship in Prague starts

with bloody crimes!"

Der Angriff

"We want to return into the Reich!"

Voelkischer Beobachter

"Czech police attack with fire-arms and

drawn swords!"

Voelkischer Beobachter

"Germany's responsibility for the Sudeten

Germans!"
Der Angriff

"Czechs are digging trenches!"

Voelkischer Beobachter

"Now Mr. Benes has a choice!"

b (Wild cheering, as Hitler declares he is giving his last warning and that it now is "war or peace".)

Hitler:

"I have made an offer to Mr. Benes. It is nothing else but the realization of that which he himself has already promised. Peace or war, he has now in his hand. Either he is going to accept my offer now, and finally is going to grant the Germans their liberty, or we shall now get ourselves this liberty, for I am now leading my people as the first soldier and behind me, the world may know, marches a people, and an

entirely different one than that of the year 1918. And so I ask you, my German people; fall in behind me, man after man, woman after woman."

#### 42. MUNICH PACT (29 September 1938).

- a (Interior of room in which pact is signed; Hitler, Goering, Mussolini, Ciano, laughing as they await Chamberlain and Daladier.)
- b (Chamberlain, followed by Daladier, walks up stairs and enters room.)
- c (Hitler sits on couch, smilingly offering chair to Chamberlain, who declines.)
  - d (Daladier signs; Mussolini, Chamberlain and Hitler follow.)
  - e (British and French leave room.)
  - f (Goering laughs and rubs hands together in obvious glee.)

#### 43. OCCUPATION OF THE SUDETENLAND (1 October 1938.)

a (Troops push aside border gate and cross bridge.)

Headline:

Voelkischer Beobachter

"Cession of the Sudetenland!"

Nazi Poster:

"Krumau thanks her liberators!"

Nazi Poster:

"Franzenbad thanks the Fuehrer!"

- b (Planes, tanks, cavalry.)
- d (Hitler enters in staff car.)
- e (Henlein introduces Hitler to crowd, Keitel behind him.)

Henlein:

"Our salute and our thanks to the man who has delivered Germany out of the betrayal to freedom!"

#### 1939

- 45. HITLER PREDICTS ANNIHILATION OF THE JEWISH RACE IN EUROPE IF WAR OCCURS (30 January 1939).
- a (Hitler in Reichstag, Goering presiding. Speer seen in audience.)

Hitler:

"Today I want to be a prophet again. If the international financial Jewry within and without Europe should succeed again in plunging the people into another World War, the result will not be the Bolshevist reign on earth, and thereby the victory of the Jewry, but rather, the annihilation of the Jewish race in Europe!"

b (Great applause.)

- 46. PRESIDENT HACHA OF CZECHOSLOVAKIA ARRIVES IN BERLIN AS GUEST OF HITLER (14 March 1939).
  - a (Newspaper headlines.)

Headlines:

Voelkischer Beobachter

"All of Czechoslovakia topsy turvy! Un-

rest and terror!"
Angriff am Abend

"Slovakia declares independence!"

b (Hacha greeted by Meissner in Berlin.)

German

Commentator:

"After the declaration of autonomy of Slovakia, Hacha, the Czech President and Chalkowsky, the Foreign Minister, arrive in Berlin for conferences with the Fuehrer. At the station they are received by Meissner, Minister of State."

c (Troops on guard.)

- 47. OCCUPATION OF REMAINDER OF CZECHOSLOVAKIA (15 March 1939).
  - a (Newspaper headlines.)

Headline:

Angriff

"Disintegration of Czechoslovakia!"

- b (Troops cross border; tanks, planes overhead.)
- c (Hitler in Prague; civilians with bandaged heads are presented to him; parade of troops.)

German
Commentator:

"Hacha, the President of State, entrusted into the hands of the Fuehrer the fate of the Czech people, when Czechoslovakia was threatened by collapse due to the declaration of independence by Slovakia. The German troops move into Bohemia and Moravia. The occupation goes per schedule, in spite of icy roads and heavy snowstorms. Prague has been reached. To-

gether with his soldiers the Fuehrer enters

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the old city of the Reich. German students and the representatives of fellow German groups greet him in the Kaiser's castle. The day of the German Army which winds up this week of world-historic significance is being celebrated by German troops in Prague, by a huge parade on the Wenzels Platz."

#### 48. OCCUPATION OF MEMEL (22 March 1939)

- a (Gates are opened; children with Nazi armbands rush in. Streets lined with Nazis saluting.)
  - b (Troops enter; artillery; planes.)
- c (Hitler and Raeder arrive on battleship. Nazi flag is raised over building.)

German
Commentator:

"Finally Memel has been liberated. After 20 years of sufferings and distress it now returns to the Reich. The Lithuanian custom-inspectors move out. The border on the bridge of Tilsit is being opened. Trip into liberated German country. At the same hour as German troops are moving in from Tilsit, the Fuehrer goes to Memel aboard the battleship 'Deutschland'. 150,000 people of the Memel unite to thank the Fuehrer, who transformed an old injustice into justice."

Transparent:

"We have returned".

# 49. REPLY TO ROOSEVELT'S PLEA THAT GERMANY AVOID AGGRESSION (28 April 1939).

a (Reichstag speech by Hitler, Goering presiding. Laughter by Goering and others throughout his reply to Roosevelt.)

Hitler:

"Representatives, men of the Reichstag! Mr. Roosevelt demands from us final assurance that the German forces will not attack the territory or possessions of the following independent nations and especially that we should not occupy them; and as countries in question he names Finland, Iceland, Lithuania, Estonia, Norway, Sweden, Denmark. Netherlands, Belgium,

Great Britain, Ireland, France, Portugal, Spain, Switzerland, Lichtenstein, Luxembourg, Poland, Hungary, Rumania, Yugoslavia, Russia, Bulgaria, Turkey, Iraq, Arabia, Syria, Palestine.

"My reply:

"First of all I went to the pains of ascertaining from the above mentioned states:
(1) Whether they feel threatened and (2) Especially whether this plea by Mr. Roosevelt had been made by a request on their part or at least with an understanding on their part. All the answers were negative, some of them in a rejecting manner.

"I also wish to declare the following: In spite of this, the German government is willing to make this promise with the condition of absolute mutuality with each of the above named states, should they so desire and should they, themselves, approach Germany with an accordingly acceptable proposal that they receive an assurance of the kind wanted by Roosevelt. With a good many of the states mentioned by Roosevelt this is a foregone conclusion anyhow, because we are already allied with them or at least are in very close friendship with them. I am also very willing to enter, with each individual state, into the agreement desired by her. But I don't want to let this opportunity pass by, without having given special assurances to the President of the North American Union about the territories which must be of first concern to him, namely, the North American Union itself and the other states on the American continent. And I here solemnly declare that any statements, which may have spread somehow, about a planned German attack or encroachment upon or within the American territories, are awkward distortions and crude lies, besides the fact that, seen from a purely military point of view, only a silly imagination can originate such a statement."

b (Wild applause by Goering and others when cancellation of German-British naval treaty is announced. Goering leads Reichstag in "Sieg heil, Der Fuehrer!"

Hitler (continuing):

"If a leading English publisher officially represents the opinion that one must put a foot down on Germany (and this is being confirmed by the policy of encirclement with which we are acquainted) then the conditions for a naval treaty have thereby been eliminated. I therefore resolved to notify the British government of this today. For us this is not a matter of substance, for I still hope that we can avoid a re-armament race, but rather an action of self respect. But should the British government deem it worthwhile to enter into negotiations with Germany again about this problem, nobody could be happier than I to be able to reach a clear and unmistakable understanding even now, if that is still possible. Otherwise, I know my people and I can depend upon it!" "To our Fuehrer, Sieg Heil!"

Goering:

- 50. SIGNING OF EUROPEAN AXIS PACT (22 May 1939).
- a (Ribbertrop meets Ciano. Parade to Chancellery.)
- b (Hitler enters room. Sits in center with Ribbentrop on one side and Ciano on other. Behind are Goering, Raeder, Keitel, etc.)
  - c (Ribbertrop and Ciano sign.)
  - d (All shake hands.)
  - e (Hitler leaves.)
- f (Ribbentrop, wearing Nazi decorations on his uniform, speaks.)

Ribbentrop:

"In the beginning of May the Fuehrer and the Duce determined to express the close friendship between their two peoples by the signing of an embracing political and military pact of alliance. In Milan, the Italian Foreign Minister and I have confirmed this decision of the chiefs of government by a handshake, accompanied by the ovation of Upper Italy which, with the consent of the entire Italian people, ac-

corded a triumphal reception to the Ambassador of the Fuehrer. Always ready to extend to a friend the hand of peace, but ironly resolved to protect and safeguard together their rights to life, 150 million Germans and Italians, together with their friends, form a block in this world which is invincible. It is a proud realization for each German and Italian to belong to this inseparable fighting community, under the singular leadership of Adolf Hitler and Benito Mussolini."

#### 51. WELCOME HOME OF GERMAN LEGION FROM SPAN-ISH WAR (6 June 1939).

- a (Legion, in Spanish uniform and carrying Spanish banners, goose-steps past reviewing stand.)
  - b (Goering, Keitel, Raeder, etc. on stand.)
  - c (Troops, sailors, pass in review.)

German
Commentator:

"The Fuehrer reviewed the parade in front of the Technischen Hochschule . . . With the music of the Legion March the units pass by, dressed in the uniforms in which they fought in Spain . . . Brigadier General Freiherr von Richthofen, the last commander of the Legion, together with his predecessors, Generals of the Air Corps Sperrle and Volkmann . . . The colors of the 'Legion Condor', which were presented by Generalissimo Franco."

# 52. INSPECTION OF WESTWALL FORTIFICATION (August 1939).

- a (Animated map of Europe showing West-Wall, as commentator explains that it frees German troops for use elsewhere.)
- b (Animated chart showing all organizations (headed by Goering, Ley, etc.), which, under leadership of Organization Todt, helped to build wall.)
  - c (Hitler, Keitel, Himmler, General Staff, etc. inspect Wall.)
  - d (Troops marching underground.)

German
Commentator:

"On the 28th of May 1938 the Fuehrer gave an order for increased and speedier construction of the Western fortifications for the protection of the German country. From his great experience in warfare he ordered size and the blueprints for a network of fortifications, such as never before has a people erected for its protection and for the safeguard of peace.

"The organization stands.... The Fuehrer, during one of his repeated inspections of

the zone of fortification."

"Werkgruppe Scharnhorst pillbox (Panzer-

werk) 1238".

German
Commentator:

Sign:

"Trains with munitions and food run without interruption through the tunnels, which
now are safe even from the heaviest fire.
"It is no longer possible to have losses such
as were caused by supplies during the
World War. During the defense, the fortifications of the West need so few crews
that the main force of the German Army
may be employed on other fronts."

#### PART IV WARS OF AGGRESSION 1939–1944

53. INVASION OF DANZIG (1 September 1939).

- a (Troops cross border; tanks.)
- b (Tanks, fire-fighters.)
- c (Hitler arrives in Danzig.)

German

Commentator:

"Under the stress of greatest threats on part of Poland, Danzig declares her independence on the 1st of September, 1939. The commissioner of the League of Nations, Dr. Burkhard, leaving his office. For the first time the Swastika flags are waving from the official buildings in Danzig."

Poster:
German
Commentator:

"Danger! Stop! Shooting going on!"
"But there is still the Polish office building in town, where armed guerillas have dug in. Under the protection of an armored car men of the Danzig Homeguard smoke out this dangerous hiding-place. On the day of the demonstration for the liberation of Danzig, the Fuehrer had summoned the

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men of the German Reichstag. He proclaimed before the whole world, that for two days he had waited in vain for a Polish deputy for a discussion of the German proposition for negotiations. Now German guns answer all Polish attacks. At the same time the first German troops moved into liberated Danzig."

#### 54. INVASION OF POLAND (1 September 1939).

- a (Troops throw aside border barrier and gates.)
- b. (Cavalry, tanks, armored cars, motorcycles.)
- c (Fighting beyond border.)

German
Commentator:

"On the 1st of September, 1939, the Fuehrer declares in the Reichstag: 'During the night Poland with regular troops has fired for the first time on our territory. Since 0545 hours we have been shooting back.'

"Thus one removes borders, which the apostles of hate from Versailles believed to be able to separate fellow Germans from the German Reich."

#### 55. GOERING DISCUSSES INVASION OF POLAND

(Goering, in Luftwaffe uniform, describes work of Luftwaffe in invasion of Poland. Montage of planes over Warsaw as he speaks. He returns to screen to promise to England and France the same fate that the Luftwaffe gave to Poland.)

Goering:

"The most impressive pictures in this film display to the German people the tremendous impact of the Polish war, especially the activity of our Luftwaffe. Once, when at Versailles this beautiful weapon was taken away from the German people, one did not anticipate that this weapon would rise again under the leadership of Adolf Hitler, newer, stronger, and more potent. Now we stand at the end of the first phase of this enormous battle. The things the Luftwaffe promised in Poland, this Luftwaffe is going to keep in England and in

France; that means that there, too, it will meet the enemy, defeat him and destroy him."

#### 1940 56. INVASION OF DENMARK AND NORWAY (9 April 1940).

- a (Troops entering Denmark. Artillery.)
- b (Troops on ships entering Norwegian harbors.)
- c (Paratroops land. Fighting and fires.)
- d (German troops on guard in Oslo.)

### German Commentator:

"German troops landed in the hours of the morning of the 9th of April in numerous ports of Norway and Denmark. An accomplishment without equal in the history of naval warfare.

"Here, troop transport ships entering the Little Belt'.

"A few minutes later units of the German Luftwaffe fly over the capital of Denmark as per schedule. They drop leaflets which inform the population that our soldiers do not come as enemies, but rather as friends, who are occupying the country solely for the protection of Danish neutrality. Anxiously, the people of Copenhagen watch the landings of every newly arriving German troops. Thus all communications and highways of Denmark are being occupied by German troops according to a plan, which has been planned in detail.

"At the same time the military occupation of Norway took place.

"Sea planes have landed in the early hours of the morning in a bay, in order to prepare for the landing of strong contingents. "The objective, an airfield along the coast, has been reached.

"The occupation troops leave the plane. Arms and ammunitions are being unloaded. Shock troops start out without delay. It is their task to occupy at once all points near the airport, which are of military importance.

"Machine guns and light and heavy antiaircraft are being brought into position, in order to protect the coast also from the ground, against attempted enemy flights. "The 'Schluesseltor' before Oslo, which was defended stubbornly, is being bombed by German fighter planes. "The German troops move into Oslo to the music of a band."

#### 57. INVASION OF BELGIUM AND THE NETHERLANDS (10 May 1940).

- a (Tanks and troops crossing Belgian border and storming Liege. Paratroops land.)
  - b (Paratroops dropping into Holland.)
  - c (Dutch troops surrendering in Rotterdam.)
  - d (Bombing of Rotterdam. Fires.)

German Commentator:

"At dawn, the German armies attack on a wide front. At the same hour transport planes of the German airforce start, in order to carry courageous paratroopers and glider troops far ahead of the marching columns into the back of the enemy. It is their task to prevent the dynamiting of important highways and to interfere with the deployment of the enemy.

"Here they go over Dutch soil.

"The primary objective has been attained. Jump over Rotterdam. Together with the first paratroopers, cameramen of the propaganda companies also jump. Weapons and ammunition are being dropped in special containers, which are emptied immediately after the landing.

"The defense of Rotterdam collapses under the use of the most modern weapons. The Dutch soldier with the white flag offers the surrender of the city, which is already burning in many places.

"Flights of bombers bring relief without interruption. The military important objects of the strongly defended city of Rotterdam are being subjected to bombing.

"A big transport is afire."

#### 58. COMPIEGNE (22 June 1940).

- a General Hunziger enters railway car.)
- b (Hitler, Goering, Keitel enter car.)
- c (Signing within car.)
- d (Hunziger leaves car.)
- e (Hitler and staff leave car; all Germans shake hands; Hitler does "jig".)

German
Commentator:

"On the 22nd of June, 1850 hours, German summer time, the German-French armistice was signed in the forest of Compiegne. General Keitel, the Chief of the High Command of the Army, signed for the Germans as the representative of the Fuehrer and Commander in Chief of the Army. On behalf of France General Hunziger signed as representative of the French government. Six hours after the acceptance of the Italian armistice conditions, the armistice becomes effective in France on the 25th of June, 0135 hours. After the declaration of surrender by General Petain, General Keitel presents for signature an invitation for the Duce to come to Munich. An historic victory has been won. The armies of France have been destroyed."

#### 59. HITLER PAYS TRIBUTE TO GUSTAV KRUPP VON BOHLEN UND HALBACH (13 August 1940).

- a (Hitler enters plane to go to Krupp.)
- b (Drive into palatial Krupp estate.)
- c (Hitler decorates Gustav Krupp von Bohlen und Halbach.)
- d (Krupps and Hitler visit munitions factory.)

German
Commentator:

"The Fuehrer on his flight to Essen, where he extended his best wishes to the German industrial leader Gustav Krupp von Bohlen und Halbach, on his 70th birthday. Drive to Villa Huegel. The Fuehrer presented the Jubilar with the Honor Medal in Gold of the NSDAP for his merit to the German people and Reich. He presented him with the Distinguished Service Cross and with the decoration 'Pioneer of Work', and the

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Honor Medal in Gold, which goes with it. He is the first German manager to receive these medals.

"Afterwards the Fuehrer visited the Krupp factories."

# 60. SIGNING OF MILITARY-ECONOMIC ALLIANCE BY GERMANY, ITALY, AND JAPAN (27 September 1940).

(Room in which signing occurs. Ribbentrop, Kohuso, and Ciano sign. Hitler appears on balcony to crowd waving Nazi flags.)

German
Commentator:

"Reichsminister von Ribbentrop leads Count Ciano and the Japanese envoy Dr. Kohuso into the reception hall of the new Reich Chancellery, where the pact was signed and sealed. Reichsminister von Ribbentrop makes his report to the Fuehrer. The Fuehrer greets Count Ciano; and here, the Japanese envoy. Reichsminister von Ribbentrop emphasizes in his long statement that this Three-Power-Pact represents a military alliance between three of the mightiest countries on earth. It is to serve the creation of a just order in the European sphere as well as in the territory of East Asia. But above all else it should help to lead the world back to peace as speedily as possible."

"The signing of the pact. After completion of this act of state, the people of Berlin demonstrated enthusiastically . . —the Fuehrer."

#### 1941

#### 70. BULGARIA JOINS AXIS (1 March 1941).

- a (Bulgarian Minister-greeted by Ribbentrop.)
- b (Ribbentrop and Bulgarian Minister sign, shake hands. Hitler shakes hands with all.)

German
Commentator:

"Arrival of the Bulgarian Ministerpresident, Professor Dr. Filoff, at the Vienna airfield. To the left of the Foreign Minister of the Reich, von Ribbentrop, the

Bulgarian Ministerpresident, Professor Dr. Filoff; to the right the Italian Foreign Minister, Count Ciano.

"As part of his speech the Foreign Minister of the Reich explains that the work of all those peoples which have united in the Three-Power-Pact today is serving already for the final victory of the Axis.

"'We represent', said the Reichs Foreign Minister, 'the strongest constellation of power which may ever have existed on this earth. The armies are ready to jump and to attack and defeat England wherever it shows up. The political foundation, upon which freedom and its symbol are fought for, will forever be the Three-Power-Pact."

"The Fuehrer greets the representatives of the participating nations. The entrance of Bulgaria into the Three-Power-Pact is being considered by the world press as a new heavy defeat for England and a new and great success for the policy of peace by the Axis-Powers."

# 71. INVASION OF YUGOSLAVIA AND GREECE (6 April 1941).

- a (Animated map, showing strategic position of Bulgaria and invasion of Yugoslavia.)
  - b (Troops entering Yugoslavian territory.)
  - c (Animated map, showing invasion of Greece.)
  - d (Troops enter Greek territory. Bombing of Greek cities.)

German
Commentator:

"Serbian border fortifications and pillboxes, which were supposed to stop the advance of the German troops from the Steiermark into Croatia. They were overcome in a short time.

"The railroad track to Marburg has been dynamited in several places by the Serbs. "Across the border. Shock troops make their objective. Practically all bridges have been destroyed. Motor vehicles and heavy infantry weapons are being ferried across by means of pneumatic boats.

"The Greek front. Artillery and Stukas break up the Metaxas line. A man who makes drawings for the propaganda company, right in the artillery position.

"A new flight of Stukas zooms in.

"Pillbox after pillbox is being heavily hit. "The heavy fortifications which cover the passes are being wiped out systematically. "Saloniki is in German hands. During the World War the Allied Headquarters was here. This time, this important port has been taken by our troops after only  $4\frac{1}{2}$  days."

#### 72. INVASION OF U.S.S.R. (22 June 1941).

a (Berlin on morning of invasion. Hands of clock indicate precise time. Radio station over which announcement is made by Goebbels, Jodl behind him.)

b (Ribbentrop and Goebbels announce invasion at press conference, Funk present.)

c (Animated map of invasion of Russia.)

d (Crossing of border by troops, tanks, cavalry, artillery.)

German

"In front of the Reichschancellery in the early morning hours of the historic 22nd of June."

Commentator:

"The House of Radio!"

Sign on Building: German

Commentator:

"The broadcast of the proclamation of the Fuehrer over all German stations is being prepared.

"The Reichs Minister for People's Enlightenment and Propaganda, Dr. Goebbels, reads the proclamation of the Fuehrer. Before the whole world it uncovers for the first time the plot between London and Moscow against Germany. After months of silence the Fuehrer now, at the twelfth hour, announces the only alternative left to him with the words: 'Again I have resolved to place in the hands of our soldiers the fate and the future of the German Reich.'

"Following the reading of the proclamation of the Fuehrer, von Ribbentrop, the Foreign Minister of the Reich, announces for the first time to the German and foreign press the German note to the Soviet Union. He is interrupted by applause. "From the Cape of North to the Black Sea, on land, sea and in the air, the German army, side by side with the Finns and Rumanians, now protects Europe. Italy joins spontaneously, just like Slovakia.

"The biggest deployment of troops ever witnessed by history is now taking place along a front of 2,400 kilometers. The best soldiers of the world have fallen in to protect culture against barbarism. The fight against the lying ally of Britain now starts.

"At the front in East Prussia. Away with the border gate! The point, halt! The village is being stubbornly defended by Siberian sharpshooters."

## 73. MEETING WITH PETAIN, LAVAL, AND FRANCO IN FRANCE (October 1941).

a (Petain and Laval leave car, are greeted by Ribbentrop and Keitel and taken to Hitler. All shake hands.)

b (Hitler, Goering, Keitel in train. All apparently in high spirits.)

c (At French-Spanish border party meets Franco. He gives Fascist salute; Franco clasps Hitler's hand; he repeats salute several times, to German honor guard; all retire for conference in room and shades are drawn.)

German
Commentator:

"Marshal Petain, the Chief of the French government, arrives and is being received with military honors."

Sign on

Railroad Station:

German
Commentator:

495150-----

"On the platform of the French border station, the Fuehrer awaits the Chief of the Spanish government—The arrival of the special train—Here, for the first time, the Fuehrer meets El Caudillo.

"The conferences are in the spirit of the hearty and comradely alliance of the two nations. It touched upon all problems of

future Europe."

"Hendaye."

#### 74. A VISIT TO A CAMP NEAR MINSK.

- a (Himmler and his SS staff leave headquarters in staff car.)
- b (They stop to examine a Russian farm.)
- c (They visit SS Headquarters in Minsk.)
- d (They arrive at the camp, are greeted by commandant. They pass barbed-wire enclosure; inside are seen civilians and men in uniform lying on ground, standing in groups, etc. Himmler and staff laughing.)

## 75. DECLARATION OF WAR ON UNITED STATES. (11 December 1941).

- a (Hitler arrives in Reichstag.)
- b (He speaks. Those seen include Goering, Ribbentrop, Keitel, Jodl, Raeder, Funk, Jap diplomats, etc.)
  - c (Wild applause as declaration is read.)

German
Commentator:

"On 11 December, three days after the beginning of the war between Japan and the USA, the Fuehrer, before the Reichstag, spoke to the German people . . . The Italian and the Japanese Ambassadors . . . In a speech of world-historic significance, the Fuehrer first reviewed the course of the war against Bolshevism. In doing so, he honored the heroism of our soldiers. their accomplishments, hardships and efforts, which the homeland is hardly able to appreciate . . . In the second part of his speech, he mercilessly settled accounts with the warmonger and hypocrite Franklin Roosevelt. Side by side with Japan, Germany and Italy have now decided to conduct the fight for the defense of freedom and independence of their peoples and their countries, against the United States of America and England."

#### 76. A GIFT TO HITLER (February 1942).

- a (Quisling arrives at Berlin Chancellery. German honor guard.)
- b (He is escorted to Hitler, gives Nazi salute; they shake hands for some time.)
- c (He presents to Hitler a silver model of a Viking ship, nutional symbol of Norway.)

German
Commentator:

"Vikdun Quisling, Minister President of Norway, arrived in the Reichs capital for a visit that lasted several days. He was received by the Fuehrer for a long discussion. To the left, Reichsminister Terboven; to the right Reichsminister Dr. Lammers. Vidkun Quisling presented the Fuehrer with a present consisting of a Viking ship made of silver."

#### 77. AXIS PLANS AT BERCHTESGADEN (29 April 1942).

- a (Mussolini and staff arrive. Greeted by Hitler.)
- b (Hitler, Mussolini, Keitel, and Ciano watch as Jodl outlines military plans.)

German
Commentator:

"General Field Marshal Kesselring. discussions between the two chiefs of government were carried out in the spirit of close alliance and inseparable brotherhood of arms of the two peoples and their leaders. The discussions resulted in complete agreement of opinions about the situation, which had been caused by the crushing victories of the three powers to the Pact about the future conduct of the war of the two nations, in political respects as well as in military. The iron determination of Germany and Italy and their allies to assure the final victory, with all means at their disposal, was expressed anew. "General Jodl explains the military situation."

## 78. JAPANESE SUBMARINE WELCOMED IN GERMAN HARBOR (30 September 1942).

(Admirals Raeder and Doenitz shake hands with Japanese commander and staff, inspect ship.)

German
Commentator:

"On the Atlantic coast a Japanese submarine makes port in a German base. In the course of the common naval warfare of the Three Powers to the Pact, the Japanese warships have made contact with the forces of the Axis which operate in the Atlantic. "Reception of the courageous Japanese al-

"Admiral Schulze, the commanding admiral of France and Admiral Doenitz, the commander of the German submarines, go aboard together with the Japanese naval attaché to greet them.

"The Japanese commander reports to Grand Admiral Raeder, the commander-in-chief of the Navy."

#### 1943

# 79. SIGNING OF GERMAN-JAPANESE ECONOMIC PACT (20 January 1943).

(Ribbentrop and Oshima sign.)

German
Commentator:

"The Reichs Foreign Minister von Ribbentrop receives the Japanese Ambassador Oshima for the signing of the German-Japanese economic agreement.

"This agreement will bring to fullest utilization for total war the great economic areas of Europe and East-Asia."

### 80. ARRIVAL OF MUSSOLINI AFTER HIS "LIBERATION" (10 October 1943).

(Plane lands. Mussolini walks out. Warmly greeted by his son, Hitler, Goering, Ribbentrop, etc. Ribbentrop gives him Nazi salute. Keitel is seen.)

German
Commentator:

"After his 'liberation' the Duce immediately called upon the Fuehrer for a visit which lasted several days. The Duce greets his son Vittorio. The Reichs Foreign Minister von Ribbentrop congratulates the Duce upon his 'liberation'.—The Duce and the Reichsmarshal.—After a stay of several days in the Fuehrer's head-quarters, the Duce starts on his trip back. In an address to the Italian people the Duce called upon his faithful followers to pick up arms again at the side of Germany, Japan and the other allies, and to fight on until the final victory."

# 82. CONFERENCES AFTER HITLER'S ESCAPE FROM BOMBING PLOT (20 July 1944).

- a (Mussolini arrives and greets Hitler, whose right arm is in a sling.)
- b (Mussolini bids farewell to Hitler, Ribbentrop, and Goering.)
- c (Hitler greeted by staff, including Sauckel, Speer, Jodl, Keitel, Funk, Himmler.)

German Commentator:

"A few hours after the plot the Fuehrer receives the Duce for a discussion which was held in the spirit of the greatest of heartiness. Marshal Graziani.—The Fuehrer in a discussion with Reichsfuehrer SS Reichsminister Himmler, the commander of the homeguard. Leading men of the party, state, and army greet the Fuehrer before the beginning of decisive discussions: Reichs Economic Minister Funk; Gauleiter Sauckel; Reichsminister Speer; Dr. Sauer and Reichsminister Lammers; Reichsfuehrer SS and General Tschoerner; the Reichsminister Dr. Goebbels: General Guderian with the Reichsfuehrer SS; Dr. Goebbels talking with Reichsleiter Bormann and General Jodl. By the suggestion of the Reichsmarshal, Reichsminister Dr. Goebbels was appointed Reichs Plenipotentiary for the Total War Effort by the Fuehrer."

# 83. PEOPLE'S COURT TRIAL CONCERNING PLOT OF 20 JULY

#### JUDGE FREISLER PRESIDING

(Freisler reviles one defendant, then reviles another, who declares that he turned against the Nazis after serving in the Army and "seeing the murders in Poland". Freisler continually interrupts each. Neither "prosecution" nor "defense" takes any part in proceedings. Wehrmacht Associate Judge is seen alongside Freisler.)

Judge Freisler:

"Josef Wirmer, you belong to the black party, one can see that—there cannot be any doubt—it cannot be otherwise. Funny!

How important the office which you held as a civil lawyer must have been, that you did not even become a lawyer-that you did not even become a soldier at such an age. And then, you were put to compulsory duty. It's quite evident from your attitude that you had yourself . . . that you had to be put to compulsory duty. A fine character you are . . . yes, yes, yes, you are a fine character to have waited until you were put to duty. And then where did you go? Chemical production! Don't know a thing about chemistry! You'd have done a lot better to pick up a shooting-iron; you wouldn't have gotten silly ideas. Yes, naturally, you just told me that you were eligible for service. Now then. Don't become impudent here. We'll teach you. You are not entitled to assume judgment here. You are only here to state an answer such as is becoming to you to the statement whether you are a traitor to the National Socialistic Greater German Reich and thereby to the people of Greater Germany. Forget about your silly delusions. Leave out your Jesuitism now. Now, let's continue with our speech. This refers to Bruening's foreign policy. By the way-you have dedicated him a friendly obituary . . . Namely, you have said, that he would have done much more—he would even have solved the Corridor questionif we would have given him time. That is your conviction?"

Joseph Wirmer:

"Yes."

Judge Freisler:

"It is wonderful, only your ideal to liberate people is a thing of the past. But I am sure, there is a reason for that. The German people wanted to be free, and wanted to get rid of Bruening and his clique, who thought that a slave could regain freedom by loving servitude. That's the man you respected."

Joseph Wirmer:

"As far as I know, abroad he never . . .

the mouth politically . . ."

Judge Freisler:

"As far as you know, but in what circles

of conspiracy he is, that we know."

Judge Freisler:

"You must have had an experience of a special kind during the war in Poland. Were you not committed there in West

Prussia?"

Count Schwerin von Schwanefeld: "Yes."

Judge Freisler:

"In other words, you were permitted to liberate your home as a soldier of the Fuehrer. Where were you last?"

Count Schwerin von Schwanefeld: "Last, I was in Berlin in the foreign office

of the General . . ."

Judge Freisler:

"Yes, well, Army High Command expert. · Have you heard anything about the leaflets which the enemy has dropped even af-

ter your ill-fated plot?"

Count Schwerin von Schwanefeld: "No."

Judge Freisler:

"In one of these leaflets the English say the following: Indeed, those who have cooperated, those who engineered it, all of them are not worth anything. At best they had a perverted love for Germany.

Perverted!"

Count Schwerin von Schwanefeld: "Mr. President! The personal political experiences which I had have caused me many a difficulty because for a long time I have worked for the German people in Poland, and based upon this time I myself have experienced many a vacillation in the opinion about the Poles. That is a . . ."

Judge Freisler:

"At any rate, is this vacillation something of which you could accuse National Socialism?"

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Count Schwerin von Schwanefeld:

"I thought about the many murders . . ."

Judge Freisler:

"Murders?"

Count Schwerin von Schwanefeld:

". . . which in Germany and abroad . . ."

Judge Freisler:

"But you are a filthy rascal! Do you collapse under the stress of this vulgarity? Yes or no? Do you break down because

of it?"

Count Schwerin von Schwanefeld:

"Mr. President."

Judge Freisler:

"Yes or no, I want a clear answer."

Count Schwerin von Schwanefeld:

"No."

Judge Freisler:

"No! You could not even break down, because you are but a measly little pile of filth, which has lost all self-respect."

#### MAJOR REHMER, DECORATED FOR HIS ROLE IN SUP-PRESSION OF 20 JULY PLOT, HAILS UNITY OF NSDAP AND WEHRMACHT (July 1944).

(Rehmer, wearing his decoration, addresses Wehrmacht review in his honor. Explains that the plot was frustrated because the Wehrmacht had become "political soldiers" who follow political rather than military orders. Gives Nazi salute as troops pass by.)

German
Commentator:

"The commander of the Guard Battalion in Berlin, Major Rehmer, who earned great merits by the quick suppression of the plot and whom the Fuehrer promoted immediately to the rank of a colonel, reviewing his soldiers."

Rehmer:

"Today we are political soldiers. Our political mission is: Safeguarding of the space which we need to live in, defense of our German Fatherland, defense of our national socialistic ideal. And we are going to carry out this political mission come

what may, until our final victory."

THE END

The following attachments are being provided separately

- A. Documentary Motion Picture The al Qaida Plan (Bates Stamp #AQPL-000001)
- B. Affidavit of Evan Kohlmann regarding the production of The al Qaida Plan (found on the same DVD as The al Qaida Plan) (Bates Stamp #AQPL-000001)
- E. Documentary Motion Picture The Nazi Plan Part 1 (Bates Stamp #AQPK-002136)
- F. Documentary Motion Picture The Nazi Plan Part 2 (Bates Stamp #AQPK-002137)
- I. Documentary Motion Picture Japan in Time of Emergency (Bates Stamp #AQPK-002138)
- J. Nazi Concentration Camps (entered into evidence at the IMT at Nuremberg) (Bates Stamp #AQPK-002141)
- K. The Nuremberg Trial, PBS American Experience Series (Bates Stamp #AQPK-002141)

# THE ANATOMY OF THE NUREMBERG TRIALS

A Personal Memoir

TELFORD TAYLOR



ALFRED A. KNOPF

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In my opinion Jackson was quite right in his last statement. Although I was in general agreement with Donovan's view that the American case should include witnesses, his proposals with regard to Goering and Schacht were ill conceived and dangerous. Each of the two would gladly have seen the other boiled in oil, and if called by the prosecution each would have tried to strip the other of whatever shreds of credibility he still retained. Efforts to tie them down to prepared question-and-answer statements would have collapsed under the pressure of cross-examination, and reliance on prior undertakings by Goering would have been about as sensible as entering into a no-first-strike treaty with a cobra.

But the issue lay deeper than the hatred between Goering and Schacht. With Hitler, Himmler, and Goebbels dead, Goering was the surviving leader and symbol of Nazism. To put him forward as the man who could tell the truth about the Third Reich and lay bare the guilt of its leaders, as Donovan appeared to expect, was nothing short of ludicrous. To his fellow defendants and everyone else Goering had made it clear that his aim was to defend the record of the Nazi years and discredit the trial, to the best of his ability.

"Set a thief to catch a thief" may be a useful tactic for a district attorney fighting gangland. But summoning Goering to speak, in any other role than that of an accused murderer being given the opportunity to defend himself, could have no place in an avowedly idealistic proceeding dedicated to the future peace of the world and the advancement of international human rights.

6

On the afternoon of November 29, when Alderman had finished his presentation of documents on the annexation of Austria, there was an abrupt change in the nature and subject matter of the proceeding. Despite the evidentiary importance and intrinsic interest of Alderman's documents and commentary, even Storey saw that there could be too much of a good thing.

What came next was dictated not by logic but by felt necessity. James Donovan had a chillingly graphic film of German concentration camps ready for showing, and Amen had Lahousen ready to take the stand. Neither film nor witness had much to do with initiating aggressive war, but the umbrella of conspiracy was large enough to cover both.

Donovan explained that the film "has been compiled from motion pictures taken by Allied military photographers as the Allied armies in the West liberated the areas in which these camps were located." The narration, he stated, was "taken directly from the reports of the military photographers who filmed the camps."

Dachau, Buchenwald, and Bergen-Belsen were shown in the condi-

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tion that American and British troops found them. Even for those who, like me, had had an earlier viewing, these pictures were hard to bear. The defendants were among the many who had not seen them, and the effect was stunning. The frightful condition of the living and the cascade of naked corpses pushed by bulldozers into an immense burial ditch, were wrenching sights. Dr. von der Lippe recorded that the film would rob its viewers of sleep and that he had heard one of the defense counsel say it had become intolerable to sit in the same room with men like Kaltenbrunner and Frank. Schacht turned his back on the screen to show that he had had no connection with such bestiality; Goering tried to brazen it out; the weaker ones like Ribbentrop, Frank, and Funk appeared shattered.

Dr. Gilbert, who from time to time passed information about the defendants to Jackson, made a round of the cells that evening. Schacht and Doenitz were highly indignant that they had been obliged to sit through a public showing of despicable actions with which, in their view, they had nothing to do. Raeder declared that he "had hardly heard of concentration camps before." Frank, Funk, and Fritszche were weeping tears of shame and fear; Sauckel and Ribbentrop were also deeply stricken. The others were in better self-command, but visibly depressed. Goering, who had succeeded in raising a laugh earlier in the session when Alderman read transcripts of Goering's telephone conversations during the Austrian takeover, lamented that "then they showed that awful film, and it just spoiled everything."

The public showing of the film certainly hardened sentiment against the defendants generally, but it contributed little to the determination of their individual guilt. Lahousen's testimony the next day was more particularly targeted.

Tall, painfully thin, bald, and bony-faced, Lahousen appeared a walking skeleton as he entered the witness box. But physical frailty was not reflected in the tone or content of his testimony. Amen conducted the direct examination competently, and Lahousen made a strong impression on his audience. His evidence was disquieting to many of the defendants, especially Keitel and Ribbentrop, his principal targets.

As head of the Abwehr, Admiral Canaris was, next to Keitel, the senior staff officer of OKW, Hitler's personal headquarters, as Commander in Chief of the Wehrmacht. Canaris had taken a strong liking to Lahousen, whom he appointed one of his four section chiefs—surprising preferment to an officer only recently transferred from the Austrian Army. But Canaris apparently trusted him completely and took him to a number of high-level conferences in which Keitel and other generals and Cabinet ministers, and occasionally Hitler, participated.

Canaris kept a diary which included descriptions of these conferences. It has disappeared, perhaps destroyed by his jailers near the end of the war.

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Alderman's presentation was followed on December 11 by the showing of a long documentary film which James Donovan offered in evidence under the title *The Nazi Plan*. He explained that it was a compilation of "films made by the Nazis themselves" which had been given continuity by their assemblage chronologically in four parts: the rise of the Nazi Party (1921–1933), the seizure of totalitarian power (1933–1935), preparing for wars of aggression (1935–1939), and wars of aggression (1939–1944). The film had been prepared by professional motion picture artists, including the screenwriter Budd Schulberg, and it incorporated excerpts from Leni Riefenstahl's *Trtumph of the Will*.

Donovan presented the film on the basis that "it sums up the case thus far presented under Counts One and Two of the Indictment." That was true chronologically, but it would be hard to say that it added any new evidence of criminal guilt. However, the film portrayed the defendants, often in groups, in their public guise during the period of the conspiracy and perhaps added another dimension to the judges' mental pictures of the alleged conspirators.

The reaction of those conspirators surprised many of us. Far from viewing the film as another nail in their coffins, they enjoyed it hugely. Dr. von der Lippe wrote: "Goering was visibly delighted to see himself once more 'in the good old times,' Ribbentrop spoke of the gripping force of Hitler's personality, another defendant declared himself happy that the Tribunal would see him at least once in full uniform, and with the dignity of his office." That evening in the jail, Dr. Gilbert found Goering cocky and gloating over his own past accomplishments, Hess predicting that Germany would rise again, and Ribbentrop, "half moved to tears," confessing that "if Hitler should come to me in this cell now, and say 'Do this!'—I would still do it-isn't it amazing?"After the film was ended, Storey and Tom Dodd told the Tribunal that the remainder of the American case would comprise two parts: the conspiracy to commit war crimes and crimes against humanity, and the guilt of the organizations. The first part was based on the assumption that Article 6 of the London Charter declared such a conspiracy to be a crime—an assumption undermined by the amendment to the proposed language of Article 6 effected by Sir Thomas Barnes on July 28.\* At this point, however, neither the defense nor the Tribunal raised any objection to the introduction of evidence in support of this charge.

<sup>\*</sup>Supra, pp. 75-76. The Tribunal ultimately ruled that the conspiracies covered by the Charter were only those to commit crimes against peace.

On Trial 201

Dodd led off with a two-day documentary exposé of the Nazis' use of slave labor and of the concentration camps. The lift that some of the defendants had felt from *The Nazi Plan* soon turned to deep depression, as the scope and horror of their activities emerged from the avalanche of documents. One after another of the defendants—Rosenberg, Frank, Keitel, Seyss-Inquart, and especially Sauckel and Speer—were self-condemned by what they had said or written.

The documents contained no suggestion that the shanghaied hordes from Russia, Poland, France, and the Low Countries had joined the German labor force voluntarily. How could they, when Sauckel had declared in March 1944: "Out of 5 million foreign workers who arrived in Germany, not even 200,000 came voluntarily." Enslaved laborers and Russian prisoners of war alike, in flagrant violation of the laws of war, were set to work on military armament, or even used in combat. At a meeting in February 1943 attended by Speer and Sauckel, Goering's second-in-command, Field Marshal Erhard Milch, announced:

We have made a request for an order that a certain percentage of men in the antiaircraft artillery must be Russians. Fifty thousand will be taken altogether, thirty thousand are already employed as gunners. It is amusing that Russians must work the guns.

When Major William F. Walsh took over the presentation on the persecution of Jews, he unloaded on the defendants accusations even more lacerating than Dodd's had been. Somehow, the blandness, and often boastfulness, with which the Nazis recorded their criminal exploits were even more shocking than the deeds themselves. Thus Hans Frank, addressing a meeting of German officials at Cracow in December 1941, declared:

As far as the Jews are concerned, I want to tell you quite frankly that they must be done away with one way or another. . . . We will principally have pity on the German people only and nobody else in the whole world. As an old National Socialist I must also say: This war would be only a partial success if the whole lot of Jewry would survive it, while we would have shed our last blood to save Europe. . . . Gentlemen, I must ask you to arm yourselves against all feeling of pity. We must annihilate the Jews, wherever it is possible, in order to maintain the structure of the Reich as a whole.

\*Walsh began his presentation with documents dealing with Nazi persecution of Jews during the prewar years on the stated basis that prewar crimes against German Jews were part of the preparation for waging aggressive wars. No objection was raised at the time, but ultimately the Tribunal held that the evidence did not support such a conclusion and declined to treat prewar persecutions as crimes under the Charter.

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# Art of Justice: The Filmmakers At Nuremberg

By Philip Kennicott Washington Post Staff Writer Tuesday, November 29, 2005; C01

Years before he wrote "On the Waterfront," before that film brought him an Oscar, and before he earned the ire of many colleagues by testifying during the Hollywood communist witch hunt, writer Budd Schulberg had the distinct honor of arresting Leni Riefenstahl.

He was in Germany, assembling a film to be used at the Nuremberg trials as evidence against

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the Nazis. Riefenstahl, the legendary director and propagandist for Hitler, knew where the skeletons were. So Schulberg, dressed in his military uniform, drove to her chalet on a lake in Bavaria, knocked on her door, and told the panicked artist that she was coming with him.

"I tried to calm her down," says Schulberg, 91, remembering in a thin, dry voice an episode more than a half-century distant. But he needed her to identify the seemingly endless gallery of faces on film that he had been collecting. So, very much against her will, he drove her to Nuremberg in an inelegant open-air military vehicle, and listened to a sad and defensive argument that would define the rest of her life, and that no one would ever believe.

"She gave me the usual song and dance," he says. "She said, 'Of course, you know, I'm really so misunderstood. I'm not political.' "

The role of Schulberg and his brother Stuart in making films that indicted the Nazis is the subject of a public conversation at 7 this evening at the U.S. Holocaust Memorial Museum. Along with Stuart's daughter, Sandra Schulberg (also in the family business and producer of the film "Quills"), Budd Schulberg will discuss the frenzied months after V-E Day when the victorious allies tried to build a public, legal and permanently discrediting case against the vanquished totalitarian regime.

They were attempting to provide what the lead prosecutor at Nuremberg, U.S. Supreme Court Justice Robert H. Jackson, would call, in his opening statement, "undeniable proofs of incredible events." And they were doing it on the fly. Between June 1945 and the opening of the trial on Nov. 21, Schulberg's team worked through 10 million feet of film. They would fly regularly from Berlin, where they had set up a studio, to Nuremberg, where they were coordinating their material with the prosecutors preparing the U.S. part of the Allied legal case. They were, in many ways, helping to define what the Nazi era had meant -- the ideology, the ambition, the racism and the mechanics of the National Socialists' rise to power.

They produced a four-hour document using only original Nazi film materials. Their task would have

been easier if they had been allowed to use newsreels already in Allied possession, but the prosecutors wanted the authenticity of Nazi-produced footage.

In a 1946 article, Schulberg described the ensuing frantic chase to gather material. He befriended Soviet officers, in one case with ample quantities of vodka, to secure access to essential material. But often his crew would arrive to find an archive recently burned. To this day, he wonders if an SS film technician who was helping to make sense of the material was tipping off keepers of damning footage.

While Budd focused on assembling materials for the trial -- his film begins with his commanding officer reading an affidavit asserting that all the material is authentic and unaltered -- Stuart would help create a film that made the case to the larger world, especially to the Germans themselves. "Nuremberg: Its Lesson for Today" went well beyond an orderly assemblage of film evidence, and made an argument. An eye for art -- even if it was the aesthetics of horror -- is evident throughout. The film begins with a visually stunning sequence of devastation, Europe in ruins, followed, slowly, by the emergence of desperate survivors, a scene that suggests someone knew the end of Wagner's "Gotterdammerung."

Budd Schulberg's job may have been the easier one. His film served a limited purpose, defined by the courtroom. Stuart, working under Pare Lorentz (the legendary director who made "The Plow That Broke the Plains" and "The River"), was working on a more finished, public project. It became caught up in turf wars over the shape of the script, and who had ultimate control. Ultimately, Jackson threw his weight behind Stuart's view of the script -- perhaps the only time a Supreme Court justice has intervened in the mechanics of moviemaking.

Sandra Schulberg's research suggests that two political struggles colored the fate of her father's film. First there was a struggle between those who wanted a "sexy" film, with riveting testimony, and her father's more sober belief that the film should reflect the argument and the progress of the trial. And second, there was the gathering storm of the Cold War, and the conviction in Washington that the Soviets were our new enemies and the Germans our new allies. Although it was shown to Germans in November 1948, the English-language version was never commercially released in the United States. A series of 1949 articles in The Washington Post documents what seems a concerted government effort to suppress it. It wasn't until the 1960s that the film was given a rare showing on PBS.

Raye Farr, director of the Holocaust Museum's Steven Spielberg Film and Video Archive, says that the Schulberg films have provided the basic material for generations of documentaries about the war. Scholars, she says, still pore over the films, still question what they find in them. Using documents in the possession of Sandra Schulberg, they now know that a scene showing a gassing in Belarus is one of the few authentic depictions of the Nazis' first experiments with this new form of murder.

"It's been in there all along but we didn't know what it was and we didn't know if it is authentic," she says. Now they do.

Since the Schulbergs made their films, the public has become both more dependent on, and more distrustful of, visual data. Even the high standard that Budd Schulberg was required to meet -- that all the material be from original Nazi sources -- wouldn't necessarily be adequate today.

But they were working through the same issues that prosecutors in the trials of Slobodan Milosevic and Saddam Hussein face today, among them the tendency to want to punish extraordinary crimes outside the methodical requirements of ordinary justice.

"It holds up a mirror," Farr says, "to the issues that I think continue to remain contemporary."

From: Britt, William, LTC, DoD OGC Sent: Friday, February 15, 2008 2:42 PM

To:

Murphy, John, Mr, DoD

OGC

**Cc:** Berrigan, Michael, Mr, DoD OGC;

OGC; David, Steven, COL, DoD

OGC;

DoD OGC; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Wilkins, Donna, Ms, DoD OGC; Bley,

OGC;

LTC, DoD

DoD OGC; Chavis, Bobby, SSG, DoD OGC; Trivett,

Clayton, Mr, DoD OGC; 'Clay Trivett'

Subject: RE: Government Motion - The al Qaida Plan

Attachments: US v Hamdan - P003 - Motion To Preadmit Video.pdf

Sir/ALCON - Please find the Government motion styled, *Prosecution Motion to Pre-Admit The Documentary Motion Picture: the al Qaida Plan.* Respectfully submitted.



US v Hamdan -P003 - Motion To...

### **WILLIAM B. BRITT**

LTC, JA

Deputy Chief Prosecutor

OFFICE OF MILITARY COMMISSIONS

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### UNITED STATES OF AMERICA

v.

### SALIM AHMED HAMDAN

### D020 Defense Reply

In Support of Defense Motion to Compel Production of all Records Relating to the Accused's Confinement, Including Interrogation Plans and Manuals or Lists of Authorized Interrogation Techniques.

13 February 2008

- 1. <u>Timeliness</u>: This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court, this Court's order dated 20 December 2007 and the military commission session held on 7 February 2008.
- **Relief Sought:** Defendant Salim Ahmed Hamdan moves to compel production of all records relating to the confinement of the accused, including interrogation plans and manuals or lists of authorized interrogation techniques.
- 3. Overview: The Defense has requested all records relating to the confinement of Mr. Hamdan. The Prosecution has stated that it has complied with its discovery obligations with respect to the requested documents. The Defense does not believe the Prosecution has complied with its obligations. Specifically, the Defense submits that the Prosecution misunderstands its obligation, which is to produce all relevant documents in the possession of the United States government, not simply known to or in the possession of the Prosecution. The Defense seeks production of the remaining requested documents, or certification from the relevant agencies that no such information exists.
- **Burden and Standard of Proof:** The burden of persuasion on this motion rests with the defense. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).
- 5. Facts:

The relevant facts are set forth in the Defense Motion and the Prosecution Response.

### 6. Law and Argument:

The relevant law has been set forth in the Defense Motion. The Defense responds specifically to the Prosecution's response by lettered paragraph:

- A. Visitor logs. The Defense requests that the Prosecution confirm in writing that logs of visitors to Mr. Hamdan never existed, or if they did exist, that they were destroyed, and if so, by whom and when.
- B. Disciplinary records. The Prosecution has not provided disciplinary records for Mr. Hamdan prior to his arrival at Guantanamo Bay. The Defense continues to seek those records.
- C. Standards of Conduct/Standard Operating Procedures. The Prosecution has not provided the operating procedures for the guards specific to their supervision of Mr. Hamdan. The Defense requests that the Prosecution obtain a certification, in writing, that no such procedures ever existed, or if they did, that they were destroyed, and if so, by whom and when.
- D. Records/memoranda prepared by the U.S. Government concerning Mr. Hamdan. The Defense reiterates its request contained in its 21 May 2007 request for discovery that the Prosecution provide "a signed statement from the responsible counsel or official from each concerned government intelligence or law enforcement agency, to include but not limited to the Defense Intelligence Agency (DIA), Central Intelligence Agency (CIA), Federal Bureau of Investigations (FBI), and Naval Criminal Investigative Service (NCIS), indicating that all potentially relevant existing documents have been provided and /or if a document has been withheld identifying the document, its location, and the reasons for withholding." (21 May 2007 Discovery Request) (Attachment A to Defense Motion).
- E. Interrogation plans/notes. The Defense continues to seek any notes and plans for interrogation conducted during the time Mr. Hamdan was detained in Afghanistan from November 24, 2001 onward, as well as since he has been detained at Guantanamo, created or prepared by any organization or agency of the U.S. Government. The Defense finds it hard to believe that such plans do not exist. The Defense notes that the interrogation log of at least one other detainee was publicly released. *See* Adam Zagorin and Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME MAGAZINE, Jan. 12, 2005, available at <a href="http://www.time.com/time/magazine/article/0,9171,1071284,00.html">http://www.time.com/time/magazine/article/0,9171,1071284,00.html</a> (last visited 13 Feb. 2008). Further, the Defense notes that the fact that such plans are classified

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<sup>&</sup>lt;sup>1</sup> The TIME Magazine article refers to information that may be classified SECRET. Accordingly, the Defense has provided an electronic link to the article but has not attached the actual article to this submission.

suggests that they do indeed exist. *See* JTF-GTMO Security Classification Guide.<sup>2</sup> The Defense requests that the Prosecution seek certification in writing that no additional notes, plans or logs ever existed, or if they did, that they were destroyed, and if so, by whom and when.

F. Interrogation techniques authorized for use against Mr. Hamdan. The Defense believes the Prosecution is obligated to produce this information pursuant to its discovery obligations.

-

<sup>&</sup>lt;sup>2</sup> The JTF-GTMO Security Classification Guide is classified SECRET. The Defense will make available to the Military Judge and the Prosecution a copy of the Guide should they so require.

The Military Judge ordered the Prosecution to comply with its discovery obligations by 31 December 2007. Nearly two months have passed since that date and the Defense has still not received much of the information necessary in order for it to adequately prepare its case. The Defense motions to litigate evidentiary issues are due on February 15, 2008. The Defense cannot possibly prepare these until it has all the information regarding the circumstances of Mr. Hamdan's detention and interrogation.

Respectfully submitted,

By: Bullah

LCDR BRIAN L. MIZER, JAGC, USN

Detailed Defense Counsel ANDREA J. PRASOW

Assistant Defense Counsel

PROF. CHARLES SWIFT Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR. JOSEPH M. MCMILLAN

Perkins Coie LLP

From: Prasow, Andrea, Ms, DoD OGC

Wednesday, February 13, 2008 4:23 PM Sent:

To:

Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Cc:

, DoD OGC; David, Steven, COL, DoD OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy,

John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna,

Ms, DoD OGĆ

OGC; 'keith.

Subject: U.S. v. Hamdan - D020 Defense Reply to Defense Motion to Compel Production (Records of

Confinement)

Signed By:

Attachments: D020 - Defense Reply to Defense Motion to Compel Production of Records of

Confinement.DOC; D020 - Defense Reply to Defense Motion to Compel Production of

Records of Confinement.pdf

Attached for filing in the case of United States v. Hamdan please find D020 Defense Reply to Defense Motion to Compel Production of all Records Relating to the Accused's Confinement, Including Interrogation Plans and Manuals or Lists of Authorized Interrogation Techniques. The PDF version is signed and the Word version is unsigned.

Respectfully submitted,

**AJP** 

Andrea J. Prasow Office of the Chief Defense Counsel Office of Military Commissions



<<...>>

### UNITED STATES OF AMERICA

v.

### SALIM AHMED HAMDAN

### **D020**

### **Government Surreply**

To Defense Motion to Compel Production of all Records Relating to the Accused's Confinement, Including Interrogation Plans and Manuals or Lists of Authorized Interrogation Techniques.

20 February 2008

- 1. <u>Timeliness</u>: This surreply is filed within the timeframe established by the Military Judge order dated 15 February 2008.
- 2. Relief Sought: The defense motion to compel production of all records relating to the confinement of the accused, including interrogation plans and manuals or lists of authorized interrogation techniques, should be denied as moot. Furthermore, the defense request for an order for the Prosecution to provide "a signed statement from the responsible counsel or official from each concerned government intelligence or law enforcement agency... indicating that all potentially relevant existing documents have been provided and /or if a document has been withheld identifying the document, its location, and the reasons for withholding" should be denied.
- 3. Overview: Orders to compel discovery should be issued when a party litigant refuses to provide documents that are subject to discovery. To date, the defense has failed to show the existence of any purported documents it seeks, let alone how those documents may, in fact, be relevant. Rather, the defense boldly, but mistakenly, asserts that the Prosecution somehow does not understand its discovery obligations. Furthermore, the Prosecution has affirmatively searched various locations of documents and provided required documents, therefore an order to compel discovery is unnecessary.

Discovery compliance is an affirmative Prosecutorial duty required of prosecutors, not for relevant agencies, to certify production or compliance with discovery obligations in criminal matters. The prosecution has not misunderstood its discovery obligations and has taken, by military justice standards, extraordinary affirmative steps to ensure its compliance with R.M.C. 701 *et al.* To date, the Prosecution believes that it has done so and, recognizing its continuing discovery obligations, will continue to do.

- 4. <u>Burden and Standard of Proof</u>: The burden of persuasion on this motion rests with the defense. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).
- 5. <u>Facts</u>: An overview of relevant facts were set forth in the original defense motion and prosecution response. To properly detail the Prosecution's compliance with discovery obligations with respect to this motion, the following additional facts are submitted:

The Prosecution has affirmatively requested and reviewed a myriad of information from a variety of U.S. entities in order to fulfill its discovery obligations articulated in the Manual for Military Commissions and R.M.C. 701 et al. The Prosecution has provided discovery in accordance with R.M.C. 701 et al. The affirmative search for information establishes what the Prosecution believes is the realistic known universe of potential holders of information that may be relevant and discoverable.

Specifically, the following information has been provided:

The accused was captured by Afghan coalition forces being supported by U.S. Forces at a roadblock established at the entrance of the town of Taktepol, Afghanistan on November 24, 2001. The accused was questioned on approximately November 26, 2001. The two interrogation sessions were captured on videotape, identified as the "capture video." (See written motions and responses to D-018). Furthermore, relevant and necessary documents reporting the battle of Taktepol, the capture of accused, and the recovery of pocket litter were provided to the defense on June 10, 2005. Defense was notified of the ability to have access to "witness A" on December 21, 2007 and the Defense questioned this witness on February 14, 2008.

During the roadblock, U.S. Forces recovered a significant number of documents, hereinafter "pocket litter." The pocket litter was segregated and subsequently sent to additional U.S. officials for exploitation. Descriptions of pocket litter were provided the defense on September 10, 2004 and the pocket litter the Prosecution intends to use at trial was provided Defense on June 10, 2005 and December 21, 2007. Furthermore, relevant reporting documents associated with the seizure and initial exploitation of pocket litter were provided to the Defense on June 10, 2005.

Approximately December 28, 2001, the accused arrived at Bagram Air Field, Afghanistan, where the small contingent of U.S. personnel took custody of the accused. Defense was provided this information in discovery on September 10, 2004. The accused was "formally in-processed" into the Bagram on December 28, 2001. The records associated with the in-processing were turned over to the Defense on or prior to December 21, 2007. These documents include medical notes by the staff surgeon, a photograph of the accused and the in-processing questionnaire.

For most of his time at Bagram, the accused was held in his original detention area, separated from other Al Qaeda or Taliban detainees. The Prosecution knows of no other non-interrogation records associated with the accused's detention at Bagram Air Base, including discipline records, interrogation plans, logs that would exist outside the interrogation documents previously provided Defense on December 18, 2003, September 19, 2004, December 21, 2007, and a newly discovered hearsay statement turned over to Defense on February 11, 2008.

The accused was transferred to the Kandahar detention facility on or around January 28, 2002. He remained in Kandahar until the April 28, 2002, when he was transferred to Guantanamo Bay, Cuba. The accused was in–processed into the Kandahar detention facility by military police and interrogators on January 28, 2002. That in-processing document and contact information for the individual responsible for it was provided to the defense. The document was provided no later then December 21, 2007 and the contact information was provided Defense on February 11, 2008.

While in U.S. control in Afghanistan, the accused was treated well; fed regular meals, received shelter and was protected from harm. The applicable regulation for interrogations by military officials was AR 34-52, a copy of which has been readily available to the Defense through the Department of Defense and via the internet. The Prosecution provided defense a copy of a website location where AR 34-52 could be downloaded, and on February 6, 2008, provided the Defense a hardcopy of the document.

The accused was questioned by a variety of U.S. Forces in Kandahar, and all known statements have long been turned over to the Defense. These statements were turned over to Defense on December 18, 2003, September 19, 2004, December 21, 2007. Similar to Bagram, there are no known additional confinement related documents regarding the accused's detention in Kandahar such as visitor logs or discipline history, nor does the Prosecution have a reasonable belief that these documents ever existed.

The accused was transferred to Guantanamo Bay, Cuba on April 28, 2002. The ATO manifest was provided to Defense on December 21, 2007. The accused was originally detained in Camp Delta. With respect to the time the accused has been detained at Guantanamo Bay, Cuba, the Defense has received:

All known statements of the accused to U.S. personnel. These statements were originally discovered to defense on December 18, 2003, September 19, 2004, December 21, 2007, and a newly discovered hearsay statement turned over to Defense on February 11, 2008.

Names and contact information of translators at JTF-GTMO were provided on December 8, 2004.

Known relevant JTF-GTMO camp records associated with the accused. This includes:

Discipline history: The accused's discipline history was originally provided the Defense on September 10, 2004. That record was updated on February 8, 2008 (see Government response). The Prosecution believes the discipline history provided to the Defense is complete and accurate or nearly complete and accurate in that the first discipline entry occurred on May 29, 2002, within a month of the accused's arrival in Guantanamo Bay. There is no evidence or information that would lead one to expect additional documents exist or ever existed. There is no evidence to suggest any documents were destroyed. The prosecution believes it has complied with this request.

Movement records: These records were originally provided the Defense on September 10, 2004 and that information was updated again on February 8, 2008. There is no evidence or information that would lead one to expect additional documents exist or ever existed. There is no evidence to suggest any documents were destroyed. The prosecution believes it has complied with this request.

Recreation history: Per the prosecution response, this information was originally going to be denied but has since been provided to the Defense on February 11, 2008.

Medical Record: The current medical record of the accused was provided Defense on February 8, 2008.

The Standard Operating Procedures for treatment of Detainees at JTF-GTMO for the years 2003, 2005, and 2007.

There are no known interrogation plans for the accused held at JTF-GTMO.

### 6. <u>Law and Argument:</u>

- a. R.M.C. 701(c) and (e) dictate prosecutorial obligations of "due diligence," "material preparation of defense" and "exculpatory evidence" standards for discovery in Military Commissions. The rules do not provide the Defense an "open door."
- 701(c) in relevant part states "the Government shall permit defense counsel to examine the following materials:
  - (1) Any books, papers, documents photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody or control of the Government, the existence of which is <u>known or by the exercise of due diligence</u> may become known to trial counsel, and which are <u>material to the preparation of the defense</u> or are <u>intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial</u>.

RMC 701(e) directs the Government "disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

- (1) Negate the guilt of the accused of an offense charged;
- (2) Reduce the degree of guilt of the accused of an offense charged; or
- (3) Reduce the punishment.

The plain language of the discovery obligations sets both an affirmative duty on the Government (due diligence) to locate documents, but also qualifies that duty to disclose to only that information material to the preparation of the defense using the standard articulated in *United States v. Younis*, 867 F.2d 617 (D.C. Cir. 1989). *Younis* articulates a three prong test for the production of information. In this case the documents must be relevant, the perceived existence of a national security privilege must be determined, and then the court must do a balancing test. As such, R.M.C. 701(c) does not contemplate providing the Defense open access to information.

# b. The Prosecution has complied with the due diligence requirement regarding the requested documents

The first issue before this court is the first prong of the Government's obligation, whether the Prosecution has acted with due diligence in conducting its search for information. The Defense contends that the Prosecution mistakenly applies its discovery obligations. This contention is not accurate. The Prosecution readily admits its discovery obligations extend

beyond the Prosecutor's own files. In this case the Prosecution has conducted a multiorganization (several separate agencies and additional organizations within the Department of
Defense) document search for information and documents and has provided the relevant and
material information to the Defense. The statement of facts provides a detailed showing of
documents provided from various search requests from different agencies. To the extent that
documents ever existed, the Prosecution has reviewed them and applied the relevant discovery
standards and the required documents were disclosed, either initially, or after the defense made
the documents relevant through a separate motion, see attachment (c) of Prosecution response to
D-020 in which it released documents they it believed were probably not relevant, but became
relevant through allegations by the Defense contained in motion D-019 [motion for pre-trial
confinement credit].

### c. Defense motion is moot.

The Defense requested court order for the discovery of various types of documents listed below fails to articulate why those documents would otherwise be relevant or necessary under RMC 701 *et al.* However, with respect to the majority of types of documents listed in the Defense motion, those requested documents do not appear to have existed. Therefore, the analysis with respect to this requested documents stops after the showing of the Prosecution's due diligence. Each requested type of document is discussed separately.

With respect to the outstanding documents in Government's reply, each answer is spelled out below.

Visitor logs. The Prosecution search of records has failed to turn up any specific visitor logs associated with the accused in Afghanistan or Guantanamo Bay. Since there are no documents that meet our understanding of this term, the prosecution cannot determine the relevance of these documents. There is no evidence that the documents ever existed or were destroyed. The Prosecution has provided the detainee movement records on September 10, 2004 and that information was updated again on February 8, 2008. The movement records explain where and when the detainee was moved from his cell, including to see visitors. There is no evidence or information that would lead one to expect additional documents exist or ever existed. There is no evidence to suggest any documents were destroyed. The Prosecution believes it has complied with this request. If the defense has specific information to either further define its request or can provide a point of contact that can describe a location of where these documents purportedly existed, the prosecution is more then willing to further focus its search, further attempt to locate what these purported documents and then perform the required discovery analysis. Simply put, the prosecution has not located any documents that meet this request and therefore, an order to compel is inappropriate.

Disciplinary records. The Prosecution has provided the defense with all known disciplinary records of the accused. These records are from JTF-GTMO. The prosecution has received the accused's known detention records for the time he was in Afghanistan. Those documents were provided to the defense at various stages of discovery. There are no known

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<sup>&</sup>lt;sup>1</sup>see United States v. Williams, 50 M.J. 436 (1999) and United States v. Simmons, 38 M.J. 376 (C.M.A. 1993), defined the due diligence in discovering results of exams and tests.

additional disciplinary records of the accused for this time period. There is no evidence that the documents ever existed or were destroyed. If the defense has specific information to further define its request or can provide a point of contact that can describe a specific location of where these documents purportedly existed, the prosecution is more then willing to further focus its search, attempt to locate what these purported documents are and then perform the required discovery analysis. An order to compel documents that are not known to exist is inappropriate.

Standards of Conduct/Standard Operating Procedures. The defense requests the absurd, a signed statement that detention officials had no procedures for conducting detention operations during the times the accused was detained. The request is made even more absurd in light of the failure to address the relevance of such documents, in the absence of any structural allegation of improper conduct during the operation of any detention facility. To the extent the issue has been raised by the filing of D-019, those SOPs have been provided. Detention operations have and are governed by Army Regulations, readily available to Defense through the same military channels as the Prosecution. Due to the potential relevance of the structural elements of defense motion D-19, those SOPs have been provided.

Records/memoranda prepared by the U.S. Government concerning the accused. The Prosecution has turned over all discoverable records or memoranda prepared by the United States Government.

Interrogation plans/notes. While RMC 701(c)(3) appears to make this type of information discoverable, so long as they are both relevant and material to the preparation of the defense, however they simply do not exist. The Prosecution has previously provided the Defense all known notes of interrogations as well as all summaries of interviews or intelligence reports associated with the statements of the accused. Furthermore, any additional documented planning associated with individual interviews may be contained within documents previously turned over known as MFRs prepared by military interrogators. However, there are no known "interrogation plans" as cited by the defense in its reply.

Interrogation plans and documents cited by the Defense to suggest the existence of a special interrogation plan for the accused, (those mentioned in the January 12, 2005 Time Magazine article about detainee 063) clearly and emphatically do not exist. The Time Magazine article details the requirements of a special interrogation plan that was required by a then existing policy for enhanced interrogation directly approved by the Secretary of Defense. The accused was NEVER approved for such enhanced interrogation techniques. Thus, there was no interrogation log or plan developed for him similar to that of detainee 063. While not specifically relevant to this motion, the Schmidt-Furlow investigation provides a very time specific detailed factual overview of the special interrogation program and the fact that only two individuals were subjected to it. The accused was NOT one of them.

Interrogation techniques: The prosecution has complied with its discovery obligations regarding authorized interrogation techniques. The applicable interrogation manual during the time of the accused's interrogations was AR-34-52. That document has been provided the defense. As stated above, the accused was not the subject of so-called "enhanced interrogation techniques" that were the subject of the Schmidt-Furlow investigation. As such, the accused was

never subjected to any of separately approved interrogation techniques approved by the Secretary of Defense. The Prosecution has complied with this request.

# d. Discovery compliance is a prosecutorial function done by prosecutors not agencies of the United States Government.

The Defense improperly asks for a court order that the Prosecution produce "a signed statement from the responsible counsel or official from each concerned government intelligence or law enforcement agency indicating that all potentially relevant existing documents have been provided and /or if a document has been withheld identifying the document, its location, and the reasons for withholding" and that the Prosecution seek certification in writing that no additional notes, plans or logs ever existed, or if they did, that they were destroyed, and if so, by whom and when.

These are improperly requested remedies for the court. Discovery compliance is a <u>prosecutorial function</u>. RMC 701 and rules of professional responsibility firmly place this burden on the prosecution not separate Department of Defense organizations or other government agencies. A certificate of compliance mandated or even contemplated from any government agency is simply improper.

In this case, Prosecutors have performed a due diligence search for required information among those entities that may possess relevant information. The Prosecution has done that.

### e. Court ordered production is not proper remedy

RMC 701(l) allows the military judge to regulate discovery. However, in this case the prosecution has readily made available those documents that are discoverable under RMC 701. Absent a specific showing of non-compliance with obligations, there is no need to issue court orders and the prosecution asserts that this motion is moot.

### f. Prosecution recognizes its continuing obligation and continues to comply

As previously stated, the prosecution realizes that discovery remains an ongoing obligation and the prosecution will continue to comply. This includes any information the defense may have that would lead to any additional information that may be discoverable.

- 7. Request for Oral Argument: The Prosecution does not require oral argument.
- **8.** List of Witnesses: There is no need for witnesses.
- 9. <u>Conference with Opposing Counsel</u>: This surreply is submitted in accordance with the

Military Judge's granting of special relief.

Respectfully submitted,

UDIA

William B. Britt LTC, JA, USA

Prosecutor

Timothy D. State
LCDR, JAGC, USN

Prosecutor

/s/ Mr. John Murphy Department of Defense Prosecutor

Britt, William, LTC, DoD OGC From:

Sent: Wednesday, February 20, 2008 5:32 PM

LTC, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD To:

OGC; Mizer, Brian, LCDR, DoD OGC; Murphy, John, Mr, DoD OGC

Cc:

OGC; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC;

LTC, DoD OGC; Jackson, Tracy, MSgt, DoD OGC; Chavis, Bobby, SSG, DoD OGC; Kelly,

Wendy, COL, DoD OGC;

Subject: RE: D020 - Prosecutions Surreply

Follow Up Flag: Follow up Flag Status: Red

Attachments: D020 - 20 Feb 08.pdf



D020 - 20 Feb 08.pdf (399 KB)

Sir/ALCON - Please find attached the Prosecutions' Surreply to D020 in pdf. It is identical in all respects to the earlier WORD filing. Thank you.

### **WILLIAM B. BRITT**

LTC, JA, USA

**Deputy Chief Prosecutor** 

OFFICE OF MILITARY COMMISSIONS

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Britt, William, LTC, DoD OGC From:

Wednesday, February 20, 2008 4:25 PM Sent:

To:

Murphy, John, Mr, DoD OGC

Cc:

'McMillan, Joseph M. (Perkins Coie)';

Morris, Lawrence, COL, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC;

m, LTC, DoD OGC; Jackson, Tracy, MSgt, DoD OGC; DoD OGC;

Kelly, Wendy, COL, DoD OGC; DoD OGC

Subject: D020 - Prosecutions Surreply Importance: High

<< File: D020 -prosecution surreply2.DOC >>

Sir/ALCON - Please find attached the Prosecutions' Surreply to D020. Thank you.

### **WILLIAM B. BRITT**

LTC, JA, USA

**Deputy Chief Prosecutor** 

OFFICE OF MILITARY COMMISSIONS

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both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender.

From:

Friday, February 15, 2008 5:34 PM Sent:

To: Britt, William, LTC, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD

OGC; Mizer, Brian, LCDR, DoD OGC; 'd '; Murphy, John, Mr, DoD

OGC

Cc: Berrigan, Michael, Mr, DoD

, MSgt, DoD OGC; David, Steven, COL, DoD

OGC;

; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Wilkins, Donna, Ms, DoD OGC; Bley,

Natalie, Ms, DoD OGC; Edmonds, Matthew, SSG, DoD OGC;

, DoD OGC; Trivett,

Clayton, Mr, DoD OGC

Subject: RE: D020 - Special Request

Follow Up Flag: Follow up Flag Status: Orange

Per CAPT Allred, the Prosecution's special request for relief to file a surreply or supplementary response to Defense reply to D020 is GRANTED. The filing is due NLT 1630 on February 20, 2008.

v/r,

To:

LTC USAR Senior Attorney Advisor Military Commissions Trial Judiciary Department of Defense

Britt, William, LTC, DoD OGC From: Sent: Friday, February 15, 2008 14:30

'; Murphy, John, Mr, DoD OGC

Berrigan, Michael, Mr, DoD OGC; GC; David, Steven, COL, DoD OGC; Cc:

C; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Wilkins, Donna, Ms, DoD OGC; Bley, Natalie, Ms, DoD OGC; Edmonds, Matthew,

SSG, DoD OGC:

Trivett, Clayton, Mr, DoD OGC

Subject: D020 - Special Request

Importance: High

Sir: Per MCTJ Rule 3.4 the Prosecution seeks special request for relief to file a surreply or supplementary response to Defense reply to D020 based on new factual information raised by the Defense. The Prosecution asks for additional time until 630 February 20, 2008 to submit its surreply or supplement. Respectfully requested.

**WILLIAM B. BRITT** 

LTC, JA **Deputy Chief Prosecutor** OFFICE OF MILITARY COMMISSIONS

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UNITED STATES OF AMERICA )	•
)	Superseding Notice of Intent to
)	File Motion for Reconsideration
)	and
)	Reply to Defense Opposition to Prosecution Request to Stay the Implementation of the
vs. )	Court's Ruling and Order on Motion to Compel Access to Seven High Value Detainees
)	
)	<b>D</b> 011
j –	
SALIM AHMED HAMDAN )	26 February 2008

1. The purpose of this filing is to notify the Court of the Government's intent to file its Motion for Reconsideration not later than Friday, 29 February 2008, notwithstanding prior notice to this Court of an earlier date. Rule of Military Commission ("R.M.C.") 905(f) provides:

On request of any party..., the military judge may, **prior to the** authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

- 2. The Government also provides this Notice to advise the Court that the Government just received the draft transcript of the 7 February 2008 hearing (today) and will require additional time to review this and other relevant materials.
- 3. Relief Sought (Clarification). The Government continues to Request a Stay of the Court's Order until such time as the Court receives, considers and rules on the Government's Motion for Reconsideration.

4. The Government and the Defense both enjoy the privilege of requesting reconsideration of the Courts Ruling<sup>1</sup> notwithstanding the Defense's characterization of the Government's invocation of this privilege as a "rehash" of prior argument. The Defense, themselves, recognize "changed circumstances" occurred when charges were sworn against several of the HVDs following the February 7, D011, Motion hearing. Furthermore, contrary to the Defense's assertions, the Government was not "fully heard" by this Court because the Defense's written reply to the Government's opposition to access contained a request to question four additional High Value Detainees ("HVDs") supported by newly filed documents. The Government seeks a stay, not for the purpose of delay, but to ensure the Military Judge receives a thorough briefing on all issues implicated by his ruling and to prevent risking the unauthorized disclosure of classified information.

5. The Government continues to emphatically oppose any adjustment of the trial date (as requested by the Defense in their D011, Response to Government's Request to Stay Implementation of the Court's Access Order). The Court recently granted the Defense an extremely generous continuance until 28 March 2008 to file evidentiary motions and associated witness requests.<sup>2</sup>

Respectfully submitted,

WILLIAM B. BRITT

LTC, JA, USAR

Prosecutor

Rule for Military Commission ("R.M.C.") 905(f).

<sup>&</sup>lt;sup>2</sup> Email to all parties from Judge Allred, 15 Feb. 2008.

TIMOTHY D. STONE LCDR, JAGC, USN Prosecutor

/s/

JOHN MURPHY DEPARTMENT OF JUSTICE Prosecutor

/s/

CLAYTON TRIVETT
OFFICE OF MILITARY COMMISSIONS
Prosecutor

### UNITED STATES OF AMERICA

v.

### SALIM AHMED HAMDAN

**Defense Opposition** 

to Prosecution Request to Stay the Implementation of this Court's Ruling and Order on Motion to Compel Access to Seven High Value Detainees

20 February 2008

- 1. <u>Timeliness</u>: This opposition is filed within the time frame permitted by the Military Judge's email order dated 15 February 2008.
- 2. Relief Sought: Defendant Salim Ahmed Hamdan asks that the Prosecution request to stay the implementation of this Court's ruling and order on the Defense Motion to Compel Access to Seven High-Value Detainees be denied.
- **Law and Argument:** "It is vain to give the accused a day in court, with no opportunity to prepare for it." *United States v. Aycock*, 15 U.S.C.M.A. 158, 160 (C.M.A. 1964)(*citing Commonwealth v. O'Keefe*, 298 Pa. 169 (Pa. 1929)). Accordingly, "no party may unreasonably impede the access of another party to a witness or evidence." Rule for Military Commission ("R.M.C.") 701(j), Manual for Military Commissions (2007 ed.); *United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994).

The Defense has met the relatively low threshold required by R.M.C. 701 to gain access to the requested seven "high value" detainees. The Defense has stated with particularity the precise nature of the testimony of each of these men and has articulated the relevance and materiality of their testimony. *See Declaration of LCDR Mizer*, dated 25 January 2008. There have been no changes to the applicable law or the facts since the Government was fully heard on this motion on February 7, 2008, and a Government motion to reconsider will merely rehash

arguments that the Government made during its lengthy argument on February 7, 2008 and on December 6, 2007.

It should be noted that at least one of the "high value" detainees that the Defense seeks to interview is expected to be detailed counsel today, February 20, 2008. His military counsel will be able to ask the detainee about the methods of his interrogation and where he was held, which the Prosecution maintains are highly classified. Yet in this case, the Prosecution has asserted in open court that no attorney from either the Prosecution or Defense can contact this detainee without damaging national security, even though the Defense does not seek to ask him about methods of interrogation or the location of his past incarceration. It is unclear why the Government seeks to further stall Mr. Hamdan's access to these men, while the Government proceeds with charging them and granting other attorneys within the Office of the Chief Defense Counsel unfettered access them.

The Defense opposes any delay in the implementation of this Court's order of 13 February 2008. The discovery process is still not complete, and the Defense has thirty-seven days to review discovery and prepare evidentiary motions. Additionally, written access to the detainees is an unquestionably inefficient means of conducting an interview, and the Defense requires as much time as possible to facilitate Mr. Hamdan's right of access to material witnesses. Should this Court grant the Prosecution's request for a stay, the Defense requests that the trial date be adjusted by a corresponding number of days to adequately allow the Defense to prepare for trial.

5. Request for Oral Argument: The Defense does not request oral argument.

Respectfully submitted,

Вух

LCDR BRIAN L. MIZER, JAGC, USN Detailed Defense Counsel

ANDREA J. PRASOW



PROF. CHARLES SWIFT Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR. JOSEPH M. MCMILLAN Perkins Coie LLP

UNITED STATES OF AMERICA	A )	
	)	D011
	)	Request to Stay
	)	The Implementation of the Court's
	)	Ruling and Order on Motion to Compe
	)	<b>Access to Seven High Value Detainees</b>
VS.	)	_
	)	
	)	
	)	
	)	19 February 2008
SALIM AHMED HAMDAN	)	·

- 1. On 13 February 2008, the Court ordered that the Defense be granted access to seven High Value Detainees (HVDs) currently detained at Guantanamo Bay, Cuba, through submission of written questions. The Prosecution is drafting a Motion for Reconsideration requesting that the Military Judge reconsider this Ruling pursuant to Rule for Military Commission ("RMC") 905(f). Accordingly, the Government respectfully requests that this Court stay implementation of its Order until it has the opportunity to review and rule upon the Government's motion. The Government intends to file its motion on 26 February 2008.
- 2. The Government submits that there is a sufficient legal and factual basis for the Military Judge to reconsider his ruling and either modify or countermand the current Order. Furthermore, this Court has granted the Defense request for a continuance to file evidentiary motions and associated witness requests until 28 March 2008. Therefore, Defense access to the HVDs is not of such immediate importance to deny the Government's request for a stay.
- 3. Finally, though the Government has identified a qualified Linguist and Government Security Officer, neither individual is currently "read in" to all facets of the Special Access Program required to commence their duties with regard to this case. The Government is taking

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<sup>&</sup>lt;sup>1</sup> Email to all parties from Judge Allred, 15 Feb. 2008.

all necessary steps to ensure that they are read in as quickly as possible.

Respectfully submitted.

/s/

WILLIAM B. BRITT LTC, JA, USAR Prosecutor

/s/

TIMOTHY D. STONE LCDR, JAGC, USN Prosecutor

/s/

JOHN MURPHY DEPARTMENT OF JUSTICE Prosecutor

/s/

CLAYTON TRIVETT OFFICE OF MILITARY COMMISSIONS Prosecutor From: Sent:

Friday, March 07, 2008 10:05 AM

To:

Subject: D011 - Post Ruling Communication

Attachments: D011 - Govt Reply to Def Opp.pdf

From:

Britt, William, LTC, DoD OGC

Sent:

Wednesday, February 27, 2008 11:45 AM

To:

Murphy, John, Mr, DoD OGC

; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC;

Cc:

; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC;

Subject:

RE: D011 - Prosecution's Superseding Notice of Intent to File MFR



D011 - Govt Reply to Def Opp.p...

Sir/ALCON - Please find attached a PDF version of the Prosecution's Superseding Notice of Intent to File MFR. It is identical in all respects to the document referenced below and filed on 26 February with the exception of the signatures. Thank you. LTC Britt.

From:

Britt, William, LTC, DoD OGC

Sent: To: Tuesday, February 26, 2008 4:33 PM

Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC;

Cc:

Murphy, John, Mr, DoD OGC

OGC; 'McMillan, Joseph M. (Perkins Coie)';

Morris, Lawrence, COL, DoD OGC; 'Schneider, Harry' (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC;

Subject:

RE: D011 - Prosecution's Superceding Notice of Intent to File MFR

<< File: D011StayReply2.doc >>

Sir/ALCON - Please find attached the above subject document. Thank you.

**WILLIAM B. BRITT** 

LTC, JA, USAR

Deputy Chief Prosecutor

OFFICE OF MILITARY COMMISSIONS

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From: Mizer, Brian, LCDR, DoD OGC

Sent: Wednesday, February 20, 2008 2:10 PM

**To:** Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Charles Swift; OGC; David, Steven, COL, DoD OGC; Harry Schneider; Joseph McMillan; Keith Allred;

, DoD OGC; Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Cc:

Subject:

<<...>>

Cc:

LtCo ,

Please find attached the Defense Opposition to the Prosecution Motion for a Stay of Judge Allred's ruling regarding D011, Defense Motion for Access to so-called "high value" detainees.

Very Respectfully,

B. L. MIZER
LCDR, JAGC, USN
Defense Counsel
Office of Military Commissions
Office of Chief Defense Counsel

From: C

Sent: Wednesday, February 20, 2008 12:49 PM

To: Britt, William, LTC, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; Murphy,

John, Mr, DoD OGC

, DoD OGC; 'McMillan, Joseph M. (Perkins Coie)';

Morris, Lawrence, COL, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC;

OGC

Subject: RE: D011 - Release of Information

CAPT Allred has directed that I inform the parties that he approves the steps referenced in the prosecution email below and the ability of the Linguist and Security Officer to consult with officials from various federal agencies that "own" whatever pieces of information these witnesses may provide, and the other terms proposed by the prosecution in the second paragraph below.

v/r,

Cc:

LTC , USAR Senior Attorney Advisor Military Commissions Trial Judiciary Department of Defense

From: Britt, William, LTC, DoD OGC
Sent: Tuesday, February 19, 2008 19:17

To: OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC;

Murphy, John, Mr, DoD OGC

, DoD OGC; 'McMillan, Joseph M. (Perkins Coie)';

Morris, Lawrence, COL, DoD OGC; 'Schneider, Harry' (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC;

Subject: D011 - Release of Information

Importance: High

Sir /ALCON - The Government is providing the following information pursuant to the Hamdan Trial Court's 13 February Ruling granting written access to Seven High Value Detainees. Linguist: Mr. Waleed Jenani, ILS, (703) 721-0457 and Government Security Officer: Mr. Brian Sorge, OMC, (703) 699-2756. Please be advised that these two individuals must be read into at least one SAP before commencing their duties with regard to this case. The Government is taking all necessary steps to ensure that they are read-in as quickly as possible.

The Government requests that the Linguist and Government Security Officer be permitted to consult with an individual or individuals in appropriate federal agencies (including those agencies which own the information at issue) for the purpose of identifying classified information and marking the documents with the appropriate classification. Under no circumstances would be these agency personnel be permitted to disclose to the prosecution the substance of these communications with the Linguist or Government Security Officer, and will be bound by any current or future restrictions the Military Judge may impose. However, these agency personnel will retain the right to advise the Military Judge, the commission members, the prosecution team, the defense team, and agency counsel as to classification issues, provided that they do not disclose their communications with the Linguist or Government Security Officer.

WILLIAM B. BRITT LTC, JA Deputy Chief Prosecutor OFFICE OF MILITARY COMMISSIONS

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AE 121 (Hamdan) Page 11 of 11

#### UNITED STATES OF AMERICA

#### D011 Government's Motion for Reconsideration

V.

Ruling on Motion to Compel Access to High Value Detainees

#### SALIM AHMED HAMDAN

29 February 2008

- **1.** <u>Timeliness</u>: This motion is timely filed. *See* Rule for Military Commissions ("RMC") 905(f).
- 2. Relief Sought: The Government respectfully moves this Court to reconsider its 13 February 2008 ruling ("Ruling"), which granted the Defense access to certain high value detainees ("HVDs").
- 3. Overview: The Ruling is premised on several misunderstandings of both the facts and applicable law. First, the Military Commissions Act of 2006 ("MCA") and RMCs require more than a "colorable showing" that a would-be witness may have exculpatory information. Second, both the Defense and Military Judge appear to have misunderstood the nature of the charges against Hamdan: The accused is not charged with having foreknowledge of the attacks on September 11th, nor is the accused charged with conspiring in or supporting those attacks. As a result, any information that the HVDs may or may not be able to offer with respect to September 11th is completely irrelevant. Moreover, Hamdan is charged with being a member of Osama bin Laden's motor pool, and as a result, any information that the HVDs may offer to corroborate that charge is *inculpatory*, not exculpatory. Third, the system of interrogatories authorized under the Ruling would be unprecedented, unjustified, and unfair even if this case was brought in federal court and even if Hamdan enjoyed all of the constitutional protections afforded to citizens of the United States. That conclusion applies a fortiori to an alien unlawful enemy combatant, such as Hamdan, who is standing trial before a military commission outside of the United States and beyond the ambit of the U.S. Constitution. Fourth and finally, the Ruling fails to take account of the fact that four of the HVDs at issue are now facing criminal charges of their own, and their rights to counsel may preclude, obviate, or (at the very least) complicate the access regime created by the Military Judge. For all of these reasons, the Ruling should be reconsidered, and the access sought in the Defense's underlying motion should be denied.
- **4. Burden:** As the moving party, the Government bears the burden on this motion. See Military Commissions Trial Judiciary Rules of Court 3(7)(a).
- 5. Facts: All of the relevant facts are already in the record.

#### 6. Discussion:

#### A. The Ruling is Premised on an Incorrect Legal Standard

Hamdan's right (or the lack thereof) to access some of the world's most dangerous suspected terrorists is governed exclusively by section 949j of the MCA and RMC 703(a), both of which impose bright-line limits on the Defense's access to witnesses and other evidence, and neither of which justifies the Ruling. The MCA provides: "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." 10 U.S.C. § 949j(a) (emphasis added). The regulations prescribed by the Secretary, in turn, provide: "The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules." RMC 703(a) (emphasis added). RMC 703 further provides that the Defense may request only those witnesses who possess "relevant and necessary" information, and the Defense must justify its request by first providing "a synopsis of the expected testimony sufficient to show its relevance and necessity." RMC 703(c)(2)(B)(i). These two provisions—section 949j of the MCA and RMC 703—are the sole sources of applicable law at issue in the Ruling.<sup>2</sup>

The Military Judge's Ruling, however, does not mention or apply the applicable law. Instead, the portion of the Ruling captioned "THE LAW" cites three different subsections of RMC 701, only one of which is relevant. See Ruling at 3. Neither RMC 701(*I*) nor 701(*f*) provides any basis whatsoever for granting access to the HVDs—indeed, not even the Defense argues to the contrary. See, e.g., footnote 2, supra. And RMC 701(j) provides only that the Defense shall have an "adequate opportunity to prepare its case" (emphasis added), which simply begs the question of what constitutes an "adequate opportunity" under the MCA. As explained above and more fully in the Government's 11 January 2008 brief ("Gov't Br."), MCA § 949j and RMC 703 answer that question: The Defense has an "opportunity" to obtain witnesses (and other evidence) only as prescribed in the Manual for Military Commissions ("MMC"). And the Manual specifically prohibits access to a witness absent the Defense's showing of the witness's

The implementing regulations likewise provide a right of access to witnesses—but only as authorized and circumscribed by the MCA and RMCs. See Regulation for Trial by Military Commissions 17-2(a) ("Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.") (emphasis added). Nothing in either the MCA or the MMC provides the Defense with a freestanding, "reasonable" opportunity to obtain witnesses.

Although the Defense initially (and erroneously) grounded its motion to compel access upon wholly inapplicable provisions of international law, see 4 Dec. 2007 Mot. at 3 n.1, the Defense subsequently recognized the error in its ways. In its reply brief, the Defense shifted horses and effectively conceded that the MCA and RMCs are the only sources of "applicable law." See Reply Br. at 5. Although the Defense baldly asserted that "Rule 701 . . . permits access to witnesses with relevant information for purposes of discovery," id., it pointed to no specific subsection to justify that contention. Nor could it, given that nothing in RMC 701 (or any other provision of the MCA or Manual for Military Commissions) supports the Defense's baseless claim. Although it should go without saying, ipse dixit assertions do not qualify as bona fide legal arguments.

"relevance and necessity." RMC 703(c)(2)(B)(i); cf. RMC 701(c), discussion note (citing United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989), which held that the defense's "mere showing of theoretical relevance" is insufficient to overcome the Government's national security privilege). Indeed, the Defense must demonstrate the "relevance and necessity" of a would-be witness even where, unlike here, there is no countervailing national security interest. Neither in its briefs nor in its oral presentation at GTMO has the Defense offered any argument to the contrary.

In any event, if there is one thing that the parties can agree upon, it is that the legal standard adopted in the Ruling is incorrect. The Military Judge concluded that access to the HVDs was justified because the Defense "made a colorable claim that these detainees may have potentially exculpatory evidence." Ruling at 3. The "colorable claim" standard, however, can be found nowhere in the MCA, the MMC, or any of the briefs, affidavits, or oral arguments offered by either of the parties. Although the Defense has made several bald assertions in connection to this motion, see, e.g., Reply Br. at 8 (discussing what al-Nashri "will state," without citing any document produced in discovery that would support that claim), not even the Defense has ever suggested that a merely "colorable claim" is sufficient to justify its access to some of the world's most dangerous suspected terrorists.

Indeed, the only conceivable relevance of the "colorable claim" standard is that in federal court, the Government must make "a colorable claim to preclude discovery based upon national security concerns." *United States v. Mohamed*, 410 F. Supp. 2d 913, 918 (S.D. Cal. 2005). Assuming *arguendo* that that federal-court standard were relevant here, the Hilton Declaration (attached to the Government's 11 January 2008 brief) obviously and easily constitutes a "colorable claim," as this Court itself recognized, *see* Ruling at 3-4.

Indeed, the Supreme Court has held that even the Sixth Amendment—which, of course, does not apply here—requires more than something akin to a "colorable claim." See, e.g., United States vs. Valenzuela-Bernal, 458 U.S. 858 (1982). In Valenzuela-Bernal, the Court held that a criminal defendant who—unlike Hamdan—is entitled to all of the Constitution's protections, is nonetheless not entitled to access witnesses whose testimony could "conceivably benefit" the defense. Instead the Supreme Court required that the defendant make a "plausible showing" that the testimony of the witness would be "both material and favorable to his defense." Id. at 867. The Ruling is therefore premised upon an arguably lower standard for access to enemy combatant terrorist witnesses held under strict security protocols than the federal courts have applied in cases where the witnesses did not present national-security concerns, see Valenzuela-Bernal, 458 U.S. at 860-61, and where the defendant was entitled to the full protections of the United States Constitution, see id. at 867; see also United States vs. Moussaoui, 382 F.3d 453, 463 (4th Cir. 2004).

### B. Any Access to the HVDs is Unjustified Under the Correct Legal Standard

As explained above, the MCA and the RMCs—which, both parties agree, are the only applicable sources of law—require the Defense to provide a "synopsis of the expected testimony sufficient to show its relevance and necessity" before triggering the Government's obligation to facilitate access to any would-be witness. See RMC 703(c)(2)(B)(i). At the 7 February 2008 hearing in GTMO, the Government asked for, and the Military Judge agreed to provide, a line-by-line determination of the facts that make access to each HVD "relevant and necessary."

PROS: ... Your Honor, before you issue your ruling we would request a detainee-by-detainee finding as to each one, respectfully.

MJ: Let me ask--okay. That's fair enough. I really think is a good idea and I will do that.<sup>3</sup>

The Ruling, however, contains no such determinations. Nor could it, given that none of the naked allegations offered by the Defense<sup>4</sup> and adopted by the Military Judge justify access to the HVDs.

For example, the Military Judge granted the Defense access to Khalid Shayk Muhammad based on the Defense's "colorable showing" that Muhammad may (i) confirm the fact that Hamdan was a member of Osama bin Laden's motor pool and (ii) deny that Hamdan had "advance knowledge" of the attacks on September 11th or participated in the planning or execution of those attacks. See Ruling at 2. Even assuming that the Defense could accurately predict Muhammad's testimony, however, neither "colorable showing" justifies Hamdan's access to Muhammad. First, it is an inculpatory fact that Hamdan was a member of bin Laden's motor pool, and it is well established that criminal defendants—even those, unlike the accused, who enjoy constitutional rights—have no right to access or receive inculpatory information. See, e.g., United States v. Agurs, 427 U.S. 97, 112 n.20 (1976). Second, the Government has not charged Hamdan with having foreknowledge of September 11th, nor has the Government charged him with having conspired or participated in the execution of those attacks. The Government articulated this position during the 7 February hearing.<sup>5</sup> In light of that fact, it is impossible for the Defense to show, as it must, that access to Muhammad is either "relevant" to anything at issue in this case or "necessary" to the preparation of Hamdan's defense against the crimes for which he has been charged.<sup>6</sup>

<sup>&</sup>lt;sup>3</sup> Unoffical Transcript of Access Motion Hearing (D011), 7 FEB 2008, p. 215.

<sup>&</sup>lt;sup>4</sup> The Defense's rank speculation, and its exclusive reliance upon an interview with an admitted al Qaeda terrorist, is all the more remarkable given that Hamdan himself could corroborate the Defense's allegations if any of them were true.

<sup>&</sup>lt;sup>5</sup> Unoffical Transcript of Access Motion Hearing (D011), 7 FEB 2008, p. 198.

<sup>&</sup>lt;sup>6</sup> This case thus stands in sharp contrast to *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). In that case, the Government alleged—and the defendant denied—that Moussaoui had conspired to commit the attacks of September 11th. *See id.* at 457. Moussaoui successfully petitioned for access to "Witness A," who "had extensive knowledge of the September 11 plot" and whose "testimony would support

For identical reasons, neither the Defense's arguments nor this Court's Ruling justifies Hamdan's access to Ramzi bin al-Shib, Abdul-Rahim al-Sharqawi, Walid bin Attash, Abdul Rahim al-Nashri, or Mustafa Ahmed al-Hawsawi. For each of these five individuals, the Defense has offered, and the this Court has deemed sufficient, only bald assertions that Hamdan was (i) a member of bin Laden's motor pool, and (ii) not involved with "terrorist activities," including the attacks of September 11th. Again, the first assertion is inculpatory, and the second is irrelevant insofar as the Government has not charged Hamdan for participating in the attacks of September 11th. And to the extent this Court's ruling is premised on LCDR Mizer's bald assertion that these witnesses could conceivably deny that Hamdan ever participated in any terrorist activities under any circumstances anywhere in the world, we note that Hamdan is not charged with specific involvement with specific terrorist attacks or discrete terrorist activities. He is instead charged with knowingly joining al Qaeda's criminal conspiracy and providing material support to that terrorist organization.

Moreover, access to al-Sharqawi (a non-HVD) is unjustified for an additional, independent reason. After the Government did everything in its power to facilitate the Defense's access to al-Sharqawi, and prior to the filing of the Government's 11 January 2008 brief, the Military Judge specifically instructed the Government to limit its response to the three HVDs then at issue. *See* Email from CAPT Allred, 17 December 2007, 16:23 hours. It is fundamentally unfair to the Government to include al-Sharqawi in the Ruling after this Court specifically directed the Government not to discuss him in its 11 January brief. And, in any event, the Defense has done nothing to demonstrate the relevance or necessity of its access to al-Sharqawi, as explained above.

Nor has the Defense done anything to demonstrate the relevance and necessity of receiving access to Abu Faraj al-Libi. Even if it were true that all attendees at al-Qaeda training camps do not "automatically" become terrorists, see Ruling at 2, that would say nothing about whether any particular individual is a member of al Qaeda. Indeed, the charge sheet in this case does not allege that Hamdan received formal training in al Qaeda training camps. Moreover, by all accounts, Hamdan's involvement with al Qaeda extended far beyond his involvement in that terrorist organization's training camps. For example, long before the accused drove Osama bin Laden to al Qaeda's training camps, Hamdan admittedly joined a group of "Gulf Arabs" (also known as the "northern group"), which has been called "the founding members of Al Qaeda." And in any event, al-Libi's purported knowledge of the Ansars and the Taliban is irrelevant, given that the Government has not alleged that Hamdan was a member of either organization. Indeed, both the Supreme Court and this Court have concluded that Hamdan was detained in connection with our armed conflict with al Qaeda—not the Taliban or the Ansars. See

Moussaoui's claim that he was not involved in the attacks." *Id.* at 458. Thus, a witness that could corroborate or refute the defendant's involvement in September 11th was directly relevant and necessary for Moussaoui's defense. Here, however, the Government has *not* alleged (much less does it need or intend to prove) that Hamdan had specific knowledge of or was involved in the September 11th attacks—and, as a result, Muhammad's purported ability to testify on that score is utterly irrelevant and far from necessary.

<sup>&</sup>lt;sup>7</sup> See Al Quds interview with Nasser al-Bahri, Aug. 2004.

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794-96 (2006); United States v. Hamdan, 19 December 2007 Order (CAPT Allred, M.J.) at 1-2, 8. So even assuming that al-Libi could establish some nexus between Hamdan and the latter two organizations, it would not constitute a defense of any type as the charges in this case are premised on Hamdan's membership in al Qaeda and his affiliation with al Qaeda's leader, Osama bin Laden. As a result, the Defense's access to al-Libi is far from "relevant and necessary."

For similar reasons, even if Abdul Hadi al-Iraqi testified that Hamdan was fighting on behalf of or delivering a weapons shipment to either the Taliban or Ansars, that testimony would be at best irrelevant as again the charges in this case are premised on Hamdan's membership in al Qaeda and his affiliation with al Qaeda's leader, Osama bin Laden. In either event, it does not meet the threshold required by RMC 703(c)(2)(B)(i). Moreover, access to al-Iraqi is unjustified for an independent reason, which is addressed in the classified addendum to this motion.

For all the reasons set forth above, access to the HVDs is neither relevant nor necessary for the Defense's preparation for trial. All of the proffered information—in both the Defense's pleadings and this Court's Ruling—is irrelevant to the charged conduct (at best) or inculpatory (at worst). To the extent the Military Judge disagrees with any or all of the foregoing analysis, however, the Government respectfully renews its request for a line-by-line determination of the facts that purportedly make access to each HVD "relevant and necessary" under the appropriate legal standard, as embodied in RMC 703(c)(2)(B)(i).

# C. Even if the Court Determines Some Access is Required, the Approved System of Interrogatories is Does Not Allow the Government to Adequately Protect Classified Information

As explained above, the Defense has not met its burden to justify *any* access to the HVDs under the applicable legal standard. But even if some access is required on the present record, the system of interrogatories created in the Ruling is unfair and does not adequately protect the Government's ability to protect classified information. Indeed, the Ruling affords Hamdan greater rights than he would enjoy if he were charged in federal court and protected by the U.S. Constitution. *See*, *e.g.*, *United States v. Moussaoui*, 382 F.3d 453, 479 (4th Cir. 2004) (authorizing a narrower access regime for a defendant with greater rights than Hamdan). Given the enormous factual and legal differences between this case and *Moussaoui*, however, Hamdan is not entitled to the remedy created by the Fourth Circuit—much less is he entitled to the broader one created by the Military Judge.

First, as a factual matter, this case and *Moussaoui* could hardly be more different. There, unlike here, the defendant was charged with conspiring to commit the attacks of September 11th. *See*, *e.g.*, 382 F.3d at 457. Thus there, unlike here, the testimony of those with direct knowledge of that day's attacks was arguably relevant. Moreover, there, unlike here, all sides agreed that the witnesses at issue had at least some exculpatory evidence. *See*, *e.g.*, *id.* at 458 n.5 (noting that the Government had already turned over certain exculpatory information from the witnesses at issue, pursuant to its

obligations under *Brady v. Maryland*, 373 U.S. 83 (1963)). Thus there, unlike here, the defendant had proof (in the form of exculpatory evidence provided by the Government) that the would-be witnesses were relevant and necessary to his preparation for trial.

Second, the legal principles that governed and compelled the outcome in *Moussaoui* have absolutely no application in this case. Moussaoui was charged and tried in federal court in the United States, and he enjoyed the full panoply of the Constitution's protections for criminal defendants—including the Fifth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process Clause. On the other side, the Government's interests, while weighty, were not protected by the MCA's robust and unprecedented provisions. Even so, the Fourth Circuit made clear that *Moussaoui* was a close case, *see*, *e.g.*, *id.* at 471, and it emphasized that its opinion was the narrowest possible one that could accommodate Moussaoui's constitutional rights, *see id.* at 482, and the Government's "compelling" interest in protecting national security information, which is "essential to our continued existence as a sovereign nation," *id.* at 470; *see also Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation.").

Surely the relevant "balance," see Moussaoui, 382 F.3d at 474, must tip in the Government's favor here, given that (1) the Government has searched diligently and uncovered no exculpatory information from the HVDs; (2) Hamdan has absolutely no evidence—literally, none—that the HVDs have relevant and necessary information with respect to the conduct for which Hamdan was charged; (3) Hamdan is not facing trial in federal court, and he does not enjoy the protections of the U.S. Constitution, see, e.g., United States v. Hamdan, 19 December 2007 Order (CAPT Allred, M.J.) at 8-10; and (4) the Government's interests in protecting national security information are safeguarded by a statutory regime designed, in part, specifically to protect classified information. Imposing the same remedy that was arguably inappropriate even in Moussaoui—notwithstanding the myriad significant differences in this case, and notwithstanding the tectonic shifts in the parties' relative interests—is unjustified to say the least.

Not only is the Ruling unjustified, but its system of interrogatories is unfair. As an initial matter, the Ruling suggests that the Defense may submit leading questions to the HVDs—such as whether Hamdan was involved in "outside activities." *See* Ruling at 4. Given that "al Qaeda operatives are trained to disrupt the legal process in whatever manner possible," *Moussaoui*, 365 F.3d at 307, it would be unsurprising if the HVDs attempted to exculpate Hamdan when given a transparent opportunity to do so. To the extent the Military Judge determines any level of access is appropriate, the only fair way to grant it is to begin with open-ended questions—such as "Are you willing to answer questions?" or "Do you know Salim Hamdan?"—upon which both parties have an opportunity to comment.

The Ruling, however, gives the Defense *unilateral* access to some of the world's most dangerous terrorists, and it completely precludes the Government from the process. As explained in the Hilton Declaration (attached to the Government's 11 January 2008 brief), *no one*—not even the Government's prosecutors in this case—may have access to

the HVDs without a specific need for it. See, e.g., Hilton Decl. ¶¶ 19-20, at 11-12. But under the Ruling, the Defense will get unprecedented access—which continues to be "off limits" for the Prosecution—and it will be able to submit questions and review answers without sharing any information with the Government.

Indeed, even the *Moussaoui* court's remedy—which, as explained above, is much more far-reaching than is warranted or permissible here—did not go as far as the Ruling. For example, reports of the witnesses' statements were reviewed by the prosecutors and summaries thereof were provided to the defense team. During the entire process, prosecutors reviewed the information before providing it to defense counsel to ensure that relevant information was provided while protecting national security interests. Under the Ruling, by contrast, the Government enjoys none of those rights, and it is instead excised completely from the process.

Under the Ruling, the Court allows the government, via a security officer, to redact certain classified information from the answers to the interrogatories, yet it precludes Trial Counsel from being involved to provide suitable substitutes under are MCRE 505(e)(3) and (e)(4), which empower the Government to protect the disclosure of classified information during discovery. Indeed, Rule 505 serves a singular purpose namely, to allow the Government to protect from disclosure any classified information that is not exculpatory, and that is not necessary to enable the Defense to prepare for trial, and that the Government does not intend to use at trial. See, e.g., MCRE 505(e)(4). To that end, Trial Counsel must have an opportunity to review any classified information including any statements made by the HVDs—prior to its disclosure to anyone, and to make appropriate redactions, substitutions, or stipulations. See, e.g., MCRE 505(e)(3). But under the Ruling, the Government will have no access to any of the information that the Defense sends to the HVDs, nor will the Government have access to any of the information redacted by the Security Officer (either before or after the Defense's questions are submitted to the HVDs). That result is the precise opposite of the one required by MCRE 505, and it must be reconsidered.

Finally, it bears emphasis that the Court simply misapplies MCRE 505(h)(6) and (7) in its Ruling. Both sections are relevant only to disputes about the admissibility and relevance of classified information that has already been provided to the Defense and for which the Defense has given notice it would like to use at trial. It makes no sense for the Military Judge to raise the specter of sanctions against the government, see Ruling at 5,8 unless Trial Counsel is given the opportunity to propose adequate summaries or substitutions under MCRE 505(e)(3), under which the Government is entitled to seek

Moreover, sanctions are doubly inappropriate here, given the national security considerations at stake. Even in *Moussaoui*—which is easily distinguishable on both the facts and law, and which has no application here for reasons explained above—the court "emphasize[d] that no punitive sanction is warranted here because the Government has rightfully exercised its prerogative to protect national security interests by refusing to produce the witnesses." 382 F.3d at 476. That conclusion applies *a fortiori* where, as here, the Government has even more robust powers to protect the potential disclosure of classified information and where the accused does not enjoy the protections of the U.S. Constitution (including the Sixth Amendment's Compulsory Process Clause and the Fifth Amendment's Due Process Clause).

rulings from the Military Judge as to the adequacy of proposed substitutes for classified information. As explained above, the responsibility for proposing alternatives to disclosure and sanctions fall upon the Government in the first instance. And in any event, it would be surpassing strange for the Military Judge to impose sanctions on the Government (as provided under MCRE 505(h)(7)) on account of redactions that the Government has never seen and that were made by a "Security Officer who has no contact with the Prosecution." Ruling at 4.9

## D. The Ruling Fails to Account for Complications Created by Criminal Charges Against Four of the HVDs

Finally, it bears emphasis that subsequent to the parties' briefs and oral arguments on this issue, four of the HVDs—Muhammad, bin al-Shib, bin Attash, and al-Hawsawi—were criminally charged for their respective roles in the September 11th attacks. As such, each of these HVDs is now entitled to detailed defense counsel. See 10 U.S.C. § 948k(a)(3). Accordingly, the Military Judge's system of written access directly implicates the rules of professional responsibility for counsel. R.M.C. 109 sets forth complex "choice-of-law" guidance establishing ethical conduct within the framework of state, service specific, commission specific rules of practice and rules of professional responsibility.

Insofar as the Ruling may be interpreted to constitute a "court order" permitting the Defense to communicate with Muhammad, bin al-Shib, bin Attash, or al-Hawsawi over their lawyers' objections, this Court should reconsider its decision. For example, one may take the view that an attorney representing any of four charged HVDs had no opportunity to object to the Military Judge's Ruling.

The inapplicability of MCRE 505(h) is further evidenced by the fact that the Military Judge could not conduct an *in camera* presentation to determine whether to authorize alternatives to disclosure (under MCRE 505(h)(6)) or sanctions for nondisclosure (under MCRE 505(h)(7)) without allowing the Government to see the redacted information at issue. For example, it would be impossible for the Government to submit an affidavit (as required under MCRE 505(h)(2)) to demonstrate the national security nature of the information at issue without first having seen the redacted information. Similarly, it would be impossible for the Government to "provide the defense with notice of the information that will be at issue" (as required under MCRE 505(h)(3)) without first having seen the redacted information. And it would be impossible for either party to engage in "briefing and argument" (again, as required under MCRE 505(h)(3)) without the Government having seen the redacted information, and without the Defense having received a general notice of it. It is clear therefore that MCRE 505(h) is not meant to apply to this discovery phase of the proceedings, during which the Government is entitled to protect classified information from disclosure under direct review of the Military Judge only. See MCRE 505(e)(3).

<sup>&</sup>lt;sup>10</sup> It also bears emphasis that the Government is continuing to expend sizable resources to investigate and collect evidence with respect to the terrorist acts committed by the other HVDs affected by the Ruling. Those individuals very well may also be charged.

<sup>&</sup>lt;sup>11</sup> For example, ABA Model Rule 4.2, which governs contacts between represented persons and attorneys representing other clients, contact between the above four HVDs regarding their pending military commissions is now subject to the consent of those detainees' detailed military counsel.

Moreover, to the extent this Court did not intend to authorize the Defense to communicate directly with the four charged HVDs, the Ruling is moot with respect to Muhammad, bin al-Shib, bin Attash, and al-Hawsawi. For those four individuals, the Defense enjoys only the access that the HVDs' lawyers are willing to provide. Therefore, to the extent the Military Judge did not intend to override any objections by the charged HVDs' lawyers, the Government respectfully submits that the Ruling is unnecessary as applied to Muhammad, bin al-Shib, bin Attash, and al-Hawsawi, who should be stricken from the decision upon reconsideration.

- 7. Oral Argument: The Government does not request oral argument.
- **8.** Witnesses: Not applicable.
- 9. Conference: The Defense opposes this motion.
- 10. Additional Information:
  - A. Classified Addendum to the Government's Motion.

Respectfully submitted.

WILLIAM B. BRITT

LTC, JA, USAR

Prosecutor

TIMOTHY D. STONE LCDR, JAGC, USN

Prosecutor

/s/

JOHN MURPHY DEPARTMENT OF JUSTICE

Prosecutor

/s/

CLAYTON TRIVETT
OFFICE OF MILITARY COMMISSIONS

Prosecutor

Britt, William, LTC, DoD OGC From: Sent: Thursday, March 06, 2008 2:00 PM

To: C, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD

> OGC; Mizer, Brian, LCDR, DoD OGC; om'; Murphy, John, Mr, DoD

OGC

Cc: Berrigan, Michael, Mr, DoD OGC;

DoD OGC; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC;

'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins,

OGC

Subject: D011 and P-004 Hamdan; Government Request for Clarification - Motion to Compel Access

Follow Up Flag: Follow up Red Flag Status:

Sir - The Government respectfully requests that the Military Judge clarify that the 13 February 2008 ruling on D011 (the Defense's motion to compel access to HVDs) is nonfinal. The CMCR has held that a timely-filed motion for reconsideration has the effect of rendering the Military Judge's ruling "nonfinal." See United States v. Khadr, CMCR Ruling on Mot. to Dismiss at 3 (19 Sept. 2007). Notwithstanding the Government's timely-filed motion for reconsideration, however, the Defense has nevertheless taken steps to execute the nonfinal 13 February ruling. The Government therefore respectfully requests that the Military Judge order the Defense to take no further action regarding D011 until this Court has rendered its decision "final" by ruling on P004; the Government's timely-filed motion for reconsideration. Thank you. LTC Britt.

C, DoD OGC From: Thursday, March 06, 2008 12:37 PM Sent:

To: Prasow, Andrea, Ms, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC;

m'; Murphy, John, Mr, DoD OGC

Berrigan, Michael, Mr, DoD OGC; Cox, David, Steven, COL, DoD OGC; LN1, DoD OGC; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC;

'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms,

Filing Designation: P-004 Motion to Reconsider Ruling on D-011 - Motion to Compel Access - US v. Hamdan Subject:

#### All parties,

Cc:

The filing designation for the 29 FEB 08 Prosecution Motion to Reconsider Ruling on D-011 - Motion to Compel Access to High Value Detainees is P-004 Motion to Reconsider Ruling on D-011 - Motion to Compel Access - Hamdan, All future communications - whether in hard copy or by email - concerning this motion will use the filing designation as a reference in addition to the name of the filing. See RC 5.3:

- 3. Filing designation and future communications or filings.
- a. Once a filing designation has been assigned, all future communications whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:
- \* An email subject line forwarding a response to P2 in US v Jones should read: "P2 Jones Defense Response - Motion to Exclude Statements of Mr. Smith." The filename of the filings shall be the same as the response being sent.

<sup>\*</sup> The filename of a document that is an attachment to the response should read: "P2 Jones - Defense

#### Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."

v/r

**USAR LTC** Senior Attorney Advisor Military Commissions Trial Judiciary Department of Defense

From: Britt, William, LTC, DoD OGC Sent: Friday, February 29, 2008 18:28

C, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; To:

Murphy, John, Mr, DoD OGC

mil'; Lindee, Kimberlee, LN1, DoD OGC; 'McMillan, Joseph M. (Perkins Coie)'; Cc:

Morris, Lawrence, COL, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC;

Subject: RE: D011 - Prosecution's MFR (PDF)

Sir/ALCON - Please find the Government's Motion for Reconsideration (D011) PDF attached. Thank you.

#### **WILLIAM B. BRITT**

LTC, JA, USA **Deputy Chief Prosecutor** OFFICE OF MILITARY COMMISSIONS

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From: Britt, William, LTC, DoD OGC

Sent: Friday, February 29, 2008 6:14 PM OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; To:

Murphy, John, Mr, DoD OGC

, DoD OGC; 'McMillan, Joseph M. (Perkins Coie)';

Morris, Lawrence, COL, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC;

Subject: RE: D011 - Prosecution's MFR

<< File: Hamdan D011 Govt Mot for Rec 022908.doc >>

Sir/ALCON - Please find the Government's Motion for Reconsideration (D011) attached. Thank you.

**WILLIAM B. BRITT** 

Cc:

LTC, JA, USA **Deputy Chief Prosecutor** OFFICE OF MILITARY COMMISSIONS

CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender.

#### UNITED STATES OF AMERICA

v.

#### SALIM AHMED HAMDAN

#### D016

#### **Defense Supplemental Submission**

in Support of Defense Motion to Dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata* 

7 March 2008

- <u>Timeliness</u>: This supplemental brief is filed in accordance with the invitation by the
   Military Judge to submit additional authority bearing on the issue of the date of the beginning of the relevant armed conflict.
- 2. Relief Sought: Defendant Salim Ahmed Hamdan seeks dismissal of Specification 1 of Charge 1 (Conspiracy) and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 (Providing Material Support for Terrorism) for lack of subject matter jurisdiction, as the acts alleged in those Specifications involve, either in whole or in part, conduct that predates the onset of the armed conflict in which Mr. Hamdan was captured.
- charges (D016) on 7 February 2008, the Military Judge invited the parties to submit additional authority relating to the start of the "war" for purposes of determining if the military commission has jurisdiction over the acts alleged in the Charge Sheet. The Military Judge is the proper authority to determine when the war started for such jurisdictional purposes, as the facts concerning the use of U.S. armed forces during the relevant period are undisputed, and the proper application of law to undisputed facts is a question of law. Indeed, on numerous occasions throughout our history, courts have made a determination of whether a state of war exists and drawn legal conclusions based on that determination. In this case, the undisputed facts

also show that the political branches of the U.S. Government regarded the armed conflict with the perpetrators of the September 11, 2001, attacks to have begun on or near that date. Likewise, it is undisputed that U.S. military personnel were inserted into Afghanistan in October 2001 to respond to those attacks, following the Authorization for the Use of Military Force ("AUMF") passed by Congress on 18 September 2001. Accordingly, the date of the start of the relevant armed conflict for the purpose of this Commission's jurisdiction over Mr. Hamdan should be deemed to be on or near 11 September 2001, and charges relating to conduct that occurred in whole or in part prior to that date should be dismissed.

#### 4. Facts:

- A. In June 1996, President Clinton spoke at a memorial service at Eglin Air Force Base, Florida, for American Servicemen killed in Saudi Arabia, saying: "We're blessed to live in a prosperous land *in a time of peace*, but we are not free from peril." (Attachment A.)
- B. In August 1998, President Clinton announced the capture of a suspect in the bombing attack on the U.S. Embassy in Nairobi, Kenya. He thanked "our law enforcement and intelligence agencies" along with "Kenyan and Tanzanian authorities for their hard work and close cooperation with the FBI." He stated that "we will continue to use all the tools at our disposal law enforcement, diplomacy, and when necessary, America's military might," but made no mention of the deployment of armed forces or hostilities under way against the persons or group responsible for the embassy attacks. (Attachment B.)
- C. On October 14, 2000, immediately following the attack on the USS *Cole*, President Clinton stated: "This tragic loss should remind us that even when America is not at war, the men and women of our military risk their lives every day in places where comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because *the strength of our military is a major reason we are at peace*."

  (Attachment C.)
- D. On October 18, 2000, at a memorial service for the sailors killed on the USS *Cole*, President Clinton repeated his statement that "even when America is not at war, the men and women of our military still risk their lives for peace." He also stated that the men and women of the USS *Cole* "were standing guard for peace." (Attachment D.)
- E. On September 11, 2001, members of al Qaeda attacked the United States by

crashing hijacked airplanes into the World Trade Towers in New York, the Pentagon in Washington, D.C., and a field in western Pennsylvania, killing approximately 3000 people. President Bush subsequently referred to this as an "act of war." *See, e.g.*, Remarks by the President at Photo Opportunity with House and Senate Leadership (Sept. 19, 2001). (Attachment E).

- F. On September 15, 2001, in responding to the terrorist attacks, President Bush said in a radio address to the nation: "This *will be* a different kind of conflict against a different kind of enemy." (Attachment F.)
- G. On September 18, 2001, one week after the terrorist attacks, Congress passed the Authorization for the Use of Military Force, P.L. 107-40 ("AUMF"), which provides: "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." (Attachment G.)
- H. On September 20, 2001, in an address to a Joint Session of Congress and to the American People, President Bush stated: "Tonight we are a country awakened to danger and called to defense freedom... Our war on terror begins with al Qaeda, but it does not end there... Our nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans." (Attachment H.)
- I. On October 7, 2001, the United States and the United Kingdom launched a military assault on Afghanistan "designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime." Presidential Address to the Nation (Oct. 7, 2001) (Attachment I.)
- J. On November 13, 2001, President Bush issued a Military Order, 3 C.F.R. 918 (2002), that provided: "International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." (Attachment J.)
- K. In July 2002, for the purposes of permitting expedited naturalization of aliens, President Bush declared in Executive Order 13269: "I designate as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001." (Attachment K).

#### 6. Law and Argument:

## A. Determining When the Relevant Armed Conflict Began Is a Jurisdictional Issue Appropriately Decided By the Military Judge in This Case

This is a law of war commission that properly exercises jurisdiction only over alleged offenses taking place "in the context of and...associated with an armed conflict." Manual for Military Commissions, Crimes and Elements (identifying "armed conflict" as a necessary element of each of the substantive offenses triable by commission under the MCA).

In *United States v. Khadr*, the Court of Military Commission Review instructed that the military judge in a commission convened pursuant to the MCA should determine both the factual and legal issues necessary to assess whether jurisdiction exists:

The text, structure, and history of the M.C.A. demonstrate clearly that a military judge presiding over a military commission may determine both the factual issue of an accused's "unlawful enemy combatant status" and the corresponding legal issue of the military commission's *in personam* jurisdiction. A contrary interpretation would ignore . . . the long-standing history of military judges in general courts-martial finding jurisdictional facts by a preponderance of the evidence, and resolving pretrial motions to dismiss for lack of jurisdiction.

CMCR 07-001 (24 September 2007) at 24.

Thus, even if there were disputed facts bearing on the question of when the relevant armed conflict began, the Military Judge would be the finder of fact on that jurisdictional issue, based on a preponderance of the evidence standard. In this case, the relevant markers of whether the United States was at war with any group with which Mr. Hamdan was associated are not subject to reasonable dispute. There can be no contention that the political branches of the U.S. Government maintained that the United States was at war during the period immediately prior to 11 September 2001. Likewise, the can be no contention that U.S. military personnel were deployed in a war against al Qaeda. "Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law." Manual for Military Commissions,

R.M.C. 801, Discussion. In light of these undisputed facts, the Military Judge can and should rule that the United States was not involved in armed conflict with al Qaeda prior to 11 September 2001 for purposes of determining the jurisdiction of this Commission.

B. American Courts Have Often Determined Whether a State of War Exists, Relying on an Empirical Assessment of Facts and the Stance of the Political Branches

Because the existence of a state of war has legal significance in numerous contexts,

American courts have often been called upon to determine whether a state of war exists, a duty
they discharge in order to resolve the cases they must adjudicate:

Since the earliest years of the nation, courts have not hesitated to determine when military action constitutes "war." In *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 1 L.Ed. 731 (1800), the Supreme Court had to decide whether hostilities between France and the United States amounted to a state of war in order to resolve disputes over captured ships. Because outright war had not been declared, the justices examined both the facts of the conflict...and the acts of Congress that had authorized limited military action.

Campbell v. Clinton, 203 F.3d 19, 37 (D.C. Cir. 2000) (Tatel, Circuit Judge, concurring).

In *Bas v. Tingy*, after making note of the relevant facts (congressional action as well as the "bloodshed, depredation and confiscation, which has unhappily occurred," *Bas*, 4 U.S. at 39), the Supreme Court concluded that France and the United States were at war both "[i]n fact and in law." *Id.* at 42. The Court distinguished between a declared, "perfect" war, and an undeclared, "imperfect" war, which is typically "confined in nature and extent, being limited as to places, persons, and things." *Id.* at 40. Addressing the same conflict in a different case a year later, Chief Justice John Marshall wrote, "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this enquiry.... To determine the real situation of America in regard to France, the acts of congress are to be inspected." *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

A half century later, the Supreme Court was again called upon to decide whether a state

of war existed, this time in the undeclared civil war raging between the United States and the Confederate States of America. In the *Prize Cases*, the Supreme Court affirmed as lawful captures under international law the seizure of a number of ships that had attempted to run the Union blockade. The Court's decision was informed by both international law and by the division of the war powers under the U.S. Constitution:

The right of prize and capture has its origin in the 'jus belli,' and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Prize Cases, 67 U.S. 635, 666 (1862). The Court then "enquire[d] whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force." *Id.* It held that a formal declaration of war was unnecessary. Rather, in assessing whether a war existed *de facto*, the Court looked to the underlying facts:

A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*.

Id. The Court emphasized that while "a civil war is never publicly proclaimed," "its actual existence is a fact in our domestic history which the Court is bound to notice and to know." Id. at 667. It refused to "affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war in the history of the human race." Id. at 669.

With respect to the exercise of the war power by the United States, the Court noted both the exclusive power of Congress to initiate a war, and the responsibility of the President to defend the nation even in the absence of congressional action:

By the Constitution, Congress alone has the power to declare a national or foreign war.... The Constitution confers on the President the whole Executive power.... He has no power to initiate or declare a war either against a foreign nation or a domestic State.... [But,] [i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.'

Id. at 668. Ultimately, as in Bas v. Tingy, the Court had no trouble determining that a state of war existed based on its own notice of (1) the existence of active hostilities, and (2) the acts of both political branches of the government, which clearly evidenced their understanding that they were acting pursuant to their respective war powers. To resolve the legal issue posed by the seizure of the vessels and cargo, the Court needed to make such a determination, and it did not shy away from that obligation. A similar obligation rests on this Commission, as it must determine whether armed conflict existed in order to assess whether it can exercise subject matter jurisdiction over the referred charges. \(^1\)

More recent cases have also recognized that courts are fully competent to determine whether a state of war exists. *See, e.g., Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) ("no one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq"); *United States v. Castillo*, 34 M.J. 1160, 1163 (C.M.R. 1992) (identifying two tests—the *de jure* war test and the *de facto* war test—employed by courts to determine whether a "time of war" statutory requirement is satisfied); *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973) ("There would be no insuperable difficulty in a court determining

<sup>&</sup>lt;sup>1</sup> See Hamilton v. McClaughry, 136 F. 445, 451 (U.S. Ct. of Appeals, 1905) (finding, based on "the many conflicts between the forces of this government and the armed Chinese troops, and the recognition of a condition of war by the Congress of the United States," that a state of war existed in China during the Boxer Rebellion, a finding necessary to support the jurisdiction of a general court-martial that had convicted a soldier of murder during that campaign).

whether...allegations" concerning the conflict in Vietnam "are substantially true. If they are, then in our opinion...there has been a war in Indo-China."); Western Reserve Life Ins. Co. v. Meadows, 261 S.W.2d 554, 559 (1953) ("We are unwilling in deciding this case to shut our eyes to what everyone knows, that there has been...actually and in reality a war in Korea in which the United States has been seriously engaged"). In Castillo, the court noted that the existence of a de facto war is "determined by the realities of the situation as distinguished from legalistic niceties, and the existence of armed hostilities against an organized enemy is of crucial importance." 34 M.J. at 1163 (internal quotation marks and citation omitted).

Notably, in what may be the situation most analogous to the instant case—involving the issue of whether civilians should be subject to the jurisdiction of military tribunals—the U.S. Court of Military Appeals held that under the UCMJ, "for a civilian to be triable by court-martial in 'time of war,' Article 2(10) [of the UCMJ] means a war formally declared by Congress."

United States v. Averette, 41 C.M.R. 363, 365 (CMA 1970). That result, requiring a heightened threshold for the application of military justice to a civilian, is consistent with the legal traditions of a Republic founded on the principle of civilian rule and committed to its preservation.<sup>3</sup>

#### C. In the Prize Cases, the Supreme Court Also Determined When the War Began

It is also noteworthy—and particularly pertinent in the context of the Defense motion to dismiss charges based on pre-war conduct—that the Supreme Court did not fully affirm the seizure of property by the Executive in the *Prize Cases*. Although all of the vessels were found

<sup>&</sup>lt;sup>2</sup> In *United States v. Ayers*, 15 C.M.R. 220 (1954), the U.S. Court of Military Appeals looked to the analysis set forth in insurance cases such as *Western Reserve* in the course of determining whether a state of war existed. The court noted the "realism" and common-sense approach taken by the civilian courts adjudicating the meaning of "war" in insurance contracts, and stated that that approach was consistent with "the yardstick of practicality" adopted by military courts in addressing the issue for statutory and jurisdictional purposes. *Id.* at 222-224.

<sup>&</sup>lt;sup>3</sup> See, e.g., Lee v. Madigan, 358 U.S. 228, 232 (1959) ("We do not write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history").

to be legitimate prizes under the laws of war, the Court ordered that one portion of the cargo be returned to the claimants who were challenging the Executive's exercise of the war power. The property returned consisted of a quantity of tobacco, "which was bought and paid for before hostilities commenced" and which therefore could not rightfully constitute "an illegal traffic with the enemy." Id. at 682 (emphasis added). Thus, the Court did not hesitate to independently evaluate the facts concerning the date on which hostilities commenced, and to hold that action taken prior to that date could not give rise to any legal forfeiture or penalty. To that extent, then, the landmark Prize Cases held an Executive act (seizure of property) taken in the purported exercise of its war power to be legally insupportable, and resulted in an order from the Court countermanding that action. The Court took a similar step a century later in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), when it held that President Truman exceeded his authority in seizing privately-owned steel mills during the Korean War. Accordingly, there is no basis whatever to contend that American courts are disqualified from evaluating the legality of actions taken under the guise of the war power. Indeed, the Supreme Court has repeatedly emphasized that "a state of war is not a blank check for the President. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (citing Youngstown, 343 U.S. at 587).

#### D. Whether and When the War Began Is Not A Non-Justiciable Political Question

Here, a ruling on whether a state of war existed prior to 11 September 2001 will have significant legal consequences for the liberty interests of the accused. Indeed, the ruling on this issue determines whether Mr. Hamdan can be liable at all for alleged "war crimes" during that period (although, even in the absence of a state of war, he might still be subject to prosecution

under domestic law for alleged criminal offenses). It also determines whether this Commission can exercise criminal jurisdiction over Mr. Hamdan for those acts, the gravity of which was noted by the CMCR in *Khadr*: "In defining what was clearly intended to be limited jurisdiction, Congress [in the MCA] also prescribed serious criminal sanctions for those members of this select group who were ultimately convicted by military commissions." CMCR 07-001 (24 September 2007) at 13. These factors strongly militate against any argument that the existence of a war is a non-justiciable political question.

Some courts have refrained from ruling on whether a state of war existed when to do so would inject the court into a dispute between the political branches. *See, e.g.*, the concurring opinion of Judge Silberman in *Campbell*, 203 F.3d at 24-28, where members of Congress were challenging the legality of the President's policy in Kosovo. Here, however, there is no conflict between the political branches on whether a state of war existed in the period prior to 11 September 2001. Rather, as shown in the Fact section above, contemporaneous sources reveal that the Executive and Legislative Branches spoke with one voice in acknowledging peacetime conditions prior to the attacks of that date. Accordingly, this is not the context in which the political question doctrine applies.<sup>4</sup>

<sup>&</sup>lt;sup>4</sup> Moreover, even if there were a conflict between the political branches concerning the existence of a state of war, or concerning the proper division of powers relating to war (issues not raised here by the Defense motion to dismiss charges based on pre-war conduct), courts can still adjudicate those issues. *See, e.g., Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971) ("The war in Vietnam is the product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view"); *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971) ("[T]he constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of the war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine"); *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970) ("History makes clear that the congressional power 'to declare War' conferred by Article I, section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign.... [E]xecutive officers are under a threshold constitutional duty which can be judicially identified and its breach judicially determined.") (internal quotation marks omitted); *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990) ("[C]ourts do not lack the power

## E. Under Traditional Law of War Principles, "Wars" Only Exist When There Are Hostilities Between States or State-Like Entities

It is also worth pointing out that, in the context of terrorism, courts have held that violence by non-state actors generally does not constitute an "act of war." See, e.g., Pan Am. World Airways, Inc. v. Aetna Casualty & Sur. Co., 505 F.2d 989, 1012-15 (2d Cir. 1974) (holding that "under the ancient international law definition[,] war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character"; and "[t]he cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities."); Morris v. Khadr, 415 F. Supp.2d 1323, 1330-31 (D. Utah 2006) (finding that plaintiffs had made a prima facie showing under the federal Anti-Terrorism Act, 18 U.S.C. § 2333(a), that violent acts by alleged al Qaeda members in Afghanistan in 2002 were "not 'acts of war'...but are acts of international terrorism").

In this case, the Commission is applying the law of war as defined in the first instance by the MCA. *See, e.g.*, 10 U.S.C. § 950p (providing that the MCA does not create new offenses, but rather codifies pre-existing offenses under the law of war). But where the MCA is silent, it is appropriate for the Commission to look to other law of war authority, including, for example, "the ancient international law definition" of war. As noted above, American courts have relied on that definition, which required that the exercise of force be undertaken in the name of some sovereign authority, or at least an authority claiming the attributes of sovereignty.<sup>5</sup> In this case,

and the ability to make the factual and legal determination of whether this nation's military actions constitute war for the purposes of the constitutional War Clause").

<sup>&</sup>lt;sup>5</sup> See, e.g., Campbell, 203 F.3d at 28 n.3 (relying on the definition of war set forth in Samuel Johnson's Dictionary of the English Language (1755): "War may be defined [as] the exercise of violence under sovereign command against withstanders; force, authority and resistance being the essential parts thereof.") (emphasis added) (Randolph, Circuit Judge, concurring). Under traditional law of war principles, al Qaeda's relationship with the Taliban in Afghanistan would not confer on the organization the quasi-sovereign status necessary to raise conflict with al Qaeda to the level

whatever action may have been taken by or against al Qaeda in the years prior to 11 September 2001, it did not amount to "a course of hostility engaged in by entities that have at least significant attributes of sovereignty." *Pan Am.*, 505 F.2d at 1012. While the United States is a sovereign state, no one contends that al Qaeda is or was a "state[] or state-like entit[y]." *Id.* Accordingly, there is no basis for contending that isolated terrorist attacks by al Qaeda, or reprisals that may have been launched by the United States on one or two occasions prior to 11 September 2001, constituted a "war" or "armed conflict" as those terms are understood in international law.

F. Under the Concept of "War" Evident in the War Powers Resolution, It Is Clear that the United States Was Not at War with Al Qaeda During the Period Prior to 11 September 2001

While "armed conflict" is a necessary element of each substantive offense punishable under the MCA, the statute does not define either "armed conflict" or "war." Nevertheless, it is instructive to look at another statute passed by Congress to see what it reveals about the meaning of these terms as understood by the Legislative Branch. For this purpose, the War Powers Resolution (50 U.S.C. § 1541 *et seq.*), which "implements Congress's power to declare war under the Constitution," is particularly pertinent. *Campbell*, 203 F.3d at 28 (Randolph, Circuit Judge,

of "war." See Holiday Inns Inc. v. Aetna Ins. Co., 571 F. Supp. 1460, 1500 (S.D.N.Y. 1983) ("It is not sufficient to achieve such status that the group or entity in question occupy territory within the boundary of the sovereign state upon the consent of that state's de jure government").

<sup>&</sup>lt;sup>6</sup> Indeed, the Prosecution has elsewhere relied on that undisputed fact in order to argue that the Geneva Conventions do not apply in this case. *See, e.g.*, Govt. Response to Defense Motion for Order Implementing Requirements of the Fourth Geneva Convention at 10-11 (arguing that al Qaeda is neither a "State" nor a "Power" as that term is used in the Geneva Conventions, and hence, the Civilian Convention does not apply in the "U.S.—al Qaeda armed conflict").

<sup>&</sup>lt;sup>7</sup> In this connection, it is worth noting that the finding of personal jurisdiction by this Commission in its 19 December 2007 ruling was premised entirely on events that occurred within the context of a war as defined under traditional law of war principles, i.e., hostilities in Afghanistan in November 2001 between the armed forces of sovereign states, or militia or volunteer corps belonging to those armed forces. The Commission held that Mr. Hamdan was directly engaged in hostilities, but there had not been adequate showing that he was associated with legitimate armed forces. Having relied on events recognizable as a traditional war to establish personal jurisdiction, the Prosecution is now moving well beyond that war to acts remote in time, charging them as alleged war crimes.

concurring). That statute is triggered by "the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1541. Thus, there are at least two essential conditions that must be present for Congress's prerogatives with respect to "war" to be activated: (1) a deployment of U.S. armed forces, and (2) hostilities, or the imminent threat of hostilities. In this regard, the concept of "war" evidenced by the statute conforms precisely to the definitions of war that have previously been recognized in American courts and that prevail in the international community as a whole. See, e.g., Montoya v. United States, 180 U.S. 261, 267 (1901), ("the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to despatch a military force for their subjugation, is sufficient to constitute a state of war"); ICRC, Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War at 37 (J. Pictet, ed., 1960) ("Speaking generally, it must be recognized that the conflicts referred to in [Common] Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts in short, which are in many respects similar to an international war...."). In this case, prior to the September 11 attacks, there was not a deployment of U.S. armed forces against al Qaeda, nor a body of al Qaeda armed forces deployed against the United States, nor a course of hostilities, either active or imminent. Accordingly, and consistent with the empirical approach taken by American courts addressing whether a state of war exists, it cannot credibly be maintained that the United States was "at war" or involved in "armed conflict" with al Qaeda prior to 11 September 2001.

G. The Political Branches of the U.S. Government Did Not Regard the United States as Engaged in a War with Al Qaeda During the Period Prior to 11 September 2001

The Prosecution maintains that as early as February 1996, Mr. Hamdan joined (in some unspecified manner) an armed conflict against the United States. Unofficial transcript of 7

February 2008 hearing at 133, 136-37 (Attachment L). This contention is insupportable in light of numerous statements of U.S. Government officials, both before and after September 11, 2001, evidencing the widespread understanding that the United States was not at war with al Qaeda, or with any other terrorist organization, in the period prior to September 11. *See* Fact section above.

The clear import of these numerous statements is that prior to 11 September 2001, neither the American people nor their elected representatives regarded the United States as a nation at war. On the contrary, part of the shock of September 11 was that the attack came suddenly and without warning during a period when the nation generally believed itself to be at peace. Under these circumstances, it is an exercise in revisionist history to now contend that a state of war existed between the United States and al Qaeda in the period prior to 11 September 2001.<sup>8</sup>

# H. The AUMF Authorized the Limited Use of Military Force Against the Perpetrators of the September 11 Attacks, During a Timeframe that Necessarily Postdated September 11, 2001

Of the documents and statements set forth above, perhaps the most significant for purposes of determining whether an armed conflict existed prior to 11 September 2001 is the AUMF. See *Talbot*, 5 U.S. (1 Cranch) at 28 ("The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this enquiry"). That measure clearly authorized the use of U.S. armed forces in a carefully limited engagement, *i.e.*, "against those nations, organizations, or persons [the

<sup>&</sup>lt;sup>8</sup> Indeed, it was the understanding of the plurality of the Supreme Court in *Hamdan v. Rumsfeld* that the Government at that time (2006) was only contending that "the war commenced with the events of September 11, 2001." 126 S. Ct. 2749, 2778 n.31 (2006) ("Justice Thomas would treat Osama bin Laden's 1996 declaration of jihad against Americans as the inception of the war. But even the Government does not go so far;...neither in the charging document nor in submissions before this Court has the Government asserted that the President's *war powers* were activated prior to September 11, 2001."). *Id.* Likewise, the U.S. military apparently did not believe it was involved in a war until after 11 September 2001. *See*, *e.g.*, The United States Army in Afghanistan, Operation Enduring Freedom, available at <a href="http://www.history.army.mil/brochures/Afghanistan/Operation%20Enduring%20Freedom.htm">http://www.history.army.mil/brochures/Afghanistan/Operation%20Enduring%20Freedom.htm</a> (last visited 28 Feb. 2008) ("The campaign was a stirring beginning to the newly announced Global War on Terrorism").

President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons...." There is no hint of a suggestion that Congress understood the United States to be already involved in an ongoing war. On the contrary, the use of military force contemplated by the AUMF was expressly tied to the September 11 attacks, indicating by negative implication that there was no existing authorization in place or use of military force already under way in some open-ended war on terror.

Accordingly, this Commission should hold that the armed conflict against al Qaeda began no earlier than 11 September 2001, and should dismiss all charges against Mr. Hamdan that relate, in whole or in part, to alleged acts occurring prior to that time.<sup>9</sup>

7. Request for Oral Argument: The parties previously conducted oral argument on the Defense motion (D016) to dismiss certain specifications based on pre-war conduct. Given the importance of the issue, the Defense requests additional oral argument on the subject of this supplemental brief.

<sup>9</sup> Section 948d of the MCA provides that "a military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, of after September 11, 2001." However, that provision neither states, nor can be reasonably construed to imply, that the United States was engaged in a war with al Qaeda prior to September 11, 2001. Rather, it simply means that alien unlawful enemy combatants in previous armed conflicts—for example, Kosovo or the first Gulf War—could be tried by military commissions under the MCA if circumstances warranted such a prosecution. To interpret § 948d as a retroactive declaration of a state of war would run afoul of the principle discussed by the CMCR in Khadr: "No serious legal authority would contest the notion that one of the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness is the right to adequate notice and an opportunity to be heard in regard to allegations which might result in criminal sanctions. The M.C.A. did not exist until October 2006. [A current defendant before the military commissions] could not have known that [events in 2004, or earlier] could dispositively qualify him two years after the fact for potential criminal liability before a military commission.... Such lack of notice offends our most basic and fundamental notions of due process; therefore it also violates Common Article 3." CMCR, 07-001, at 15. While that passage related to a statutory interpretation that would retroactively affect personal jurisdiction in an unfair way, it holds equally true for interpretations that would retroactively affect subject matter jurisdiction in a manner offensive to due process and Common Article 3. After all, a retroactive declaration of war could easily transform conduct that was innocent at the time into a war crime, for example, aiding or communicating with the enemy (a party that may not have been the enemy at the time the acts occurred).

8. Request for Witnesses: The Defense does not presently anticipate a need for witnesses, but reserves the right to call witnesses should the Prosecution submit a response that requires rebuttal in the form of live testimony.

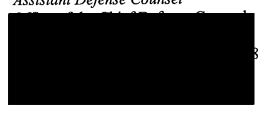
#### 9. Attachments:

- A. Remarks of President Clinton at a memorial service at Eglin Air Force Base, Florida, for American Servicemen killed in Saudi Arabia, 30 June 1996.
- B. Statement of President Clinton announcing the capture of a suspect in the bombing attack on the U.S. Embassy in Nairobi, Kenya, 27 August 1998
- C. Radio address of President Clinton following the attack on the USS *Cole*, 14 October 2000.
- D. Remarks of President Clinton at a memorial service in Norfolk, Virginia, for sailors killed on the USS *Cole*, 18 October 18, 2000.
- E. Remarks by President Bush at White House photo opportunity with House and Senate Leadership, 19 September 2001.
- F. Radio address to the nation of President Bush, 15 September 2001.
- G. Authorization for the Use of Military Force, P.L. 107-40 ("AUMF"), passed by Congress, 18 September 2001.
- H. Address by President Bush to Joint Session of Congress and to the American People, 20 September 2001.
- I. Presidential Address to the Nation announcing deployment of U.S. armed forces to Afghanistan, 7 October 2001.
- J. Military Order issued by President Bush, 3 C.F.R. 918 (2002), 13 November 2001.
- K. Executive Order 13269, issued by President Bush, 3 July 2002.
- L. Selected pages from the unofficial transcript of hearing before the Military Commission at Guantanamo Bay Naval Station, 7 February 2008.

Respectfully submitted,

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## ATTACHMENT A

#### 27 of 52 DOCUMENTS

#### Public Papers of the Presidents

June 30, 1996

CITE: 32 Weekly Comp. Pres. Doc. 1161

**LENGTH:** 969 words

**HEADLINE:** Remarks at the Memorial Service for American Servicemen Killed in Saudi Arabia at Eglin Air Force Base, Florida

#### **BODY:**

Governor Chiles, Congressman Scarborough, Lieutenant Governor MacKay, General Shalikashvili, Secretary White, Secretary Widnall, Under Secretary DeLeon, General Fogleman, General Hawley, General Cranston, Colonel Dylewski, the chaplains, Chief Lowe; to those brave servicemen who were injured, we thank God for your presence here today; to the families of the 12 men who we honor today who died in the service of our Nation.

These men represented the best of America, and they gave America their best. They stepped forward to lead our mission for peace and freedom. They did so with courage, strength, and skill. As members of the Nomads, the 33d Fighter Wing, as communicators and mechanics, crew chiefs and technicians, they kept our aircraft flying, and they owned the skies. Time and again they gave up the comforts that most of us take for granted, traveling far from home and family to take up America's cause.

There is a passage in Isaiah in which God wonders, "Whom shall I send, and who will go for us?" Isaiah answers, "Here am I, Lord. Send me." These men we honor today said to America, "Send me."

We will remember them as patriots, but they were also husbands and fathers, sons and brothers, colleagues, neighbors, and friends. Some came from families with a proud tradition of military service, Some have brothers and sisters sewing our military today. Some had dreamed of joining the Air Force since they were little boys.

All of them showed by the example of their lives the same spirit of service they brought to their careers. They were always among the first to lend a hand when someone was in need. They served as soccer coaches and Sunday school teachers. They helped the victims of hurricanes and volunteered as firemen. They loved their cars, their sports, their families, and their mission. One of them was on his third tour in Saudi Arabia. Another volunteered so a man with larger family obligations could stay home.

They were all very different, as I saw when I met with their families. They came from different regions, different ethnic groups, different religious and political backgrounds. But they were united by love of nation, mission, and family. They touched the lives of many other people, and because of them we all lead safer and better lives.

On behalf of the American people, let me say to their families and loved ones and to their friends in the Eglin community: We are grateful for their service. We stand with you in sorrow and in outrage. They were taken before their time, felled by the hands of hatred in an act whose savagery is matched only by its cowardice. We will not rest in our efforts to capture, prosecute, and punish those who committed this evil deed. But today, in the warm embrace of our faith, let us put aside our anger for a moment to remember and honor those who were lost, to find strength in their service, to thank God for the lives they lived, to continue the struggle for freedom and decency to which they devoted their lives.

Remarks at the Memorial Service for American Servicemen Killed in Saudi Arabia at Eglin Air Force Base, Florida Public Papers of the Presidents June 30, 1996

We're blessed to live in a prosperous land in a time of peace, but we are not free from peril. While the modern world brings to all of us many new opportunities, it also leaves us more open to the forces of intolerance and destruction and especially to terrorism, so often rooted in ethnic and religious hatreds, because terrorists can strike anywhere, from the Tokyo subway to the streets of London, from the Holy Land to the World Trade Center in New York and Oklahoma City and now in Saudi Arabia.

My fellow Americans, during the long struggles of World War II and the cold war, America stood fast for freedom. In our time, terrorism is the enemy of peace and freedom. America must not and America will not be driven from the fight against terrorism. In this effort, every American must stand behind the men and women of our Armed Forces. Every American must stand against violence and hatred and stand for dignity and tolerance at home as well as abroad. We must honor the memory of those we have lost by upholding the ideals for which they lived and the mission for which they gave their lives.

To the loved ones of these 12 fine men, I know there are no words to soothe the loss of a father or a husband, a brother or a son, a fiance or a dear friend. The rest of us can only hope that there is some solace for you in the pride and passion they brought to their work, the strength and decency they demonstrated every day, the love and respect they engendered and which surround you today, and the gratitude of their Nation.

Let us now praise these quiet American heroes who gave their lives in service to America. May they rest in peace, and may their names live on forever:

Technical Sergeant Daniel Cafourek

Sergeant Millard Dee Campbell

Senior Airman Earl Cartrette, Jr.

**Technical Sergeant Patrick Fennig** 

Master Sergeant Kendall Kitson, Jr.

Technical Sergeant Thanh Gus Nguyen

Airman First Class Brent Marthaler

Airman First Class Brian McVeigh

Airman First Class Peter Morgera

Airman First Class Joseph Rimkus

Senior Airman Jeremy Taylor

Airman First Class Joshua Woody

Our Nomads have ceased their wandering. They have come home. May God embrace their souls. May God bless their families and their loved ones. And may God bless America's mission of peace and freedom, for which they gave the last full measure of their devotion.

NOTE: The President spoke at 10:32 a.m. in the King Hangar. In his remarks, he referred to Gov. Lawton Chiles and Lt. Gov. Buddy MacKay of Florida; Gen. Richard E. Hawley, USAF, Commander, Air Combat Command; Maj. Gen. Stewart E. Cranston, USAF, Commander, Air Force Development Test Center; and Col. Gary R. Dylewski, USAF, Commander, and Chief Master Sgt. Troy Lowe, USAF, Senior Enlisted Adviser, 33d Fighter Wing.

Remarks at the Memorial Service for American Servicemen Killed in Saudi Arabia at Eglin Air Force Base, Florida Public Papers of the Presidents June 30, 1996

LOAD-DATE: August 02, 1996

## ATTACHMENT B

#### 8 of 29 DOCUMENTS

#### Public Papers of the Presidents

August 27, 1998

CITE: 34 Weekly Comp. Pres. Doc. 1660

LENGTH: 249 words

**HEADLINE:** Statement on the Arrest of Mohammad Rashid for the Terrorist Attack on the United States Embassy in Kenya

#### **BODY:**

Late last night, American law enforcement authorities brought to the United States Mohammad Rashid, a suspect in the bombing attack on the United States Embassy in Nairobi, Kenya. The suspect's involvement in the bombing was established as the result of a joint investigation by the Kenyan police and an FBI team. He is associated with Usama bin Ladin, the pre-eminent organizer and financier of international terrorism whose network we struck in Afghanistan and Sudan last week.

This arrest does not close this case. We will continue to pursue all those who helped plan, finance, and carry out the attacks on our Embassies in Kenya and Tanzania, which took the lives of 12 Americans and hundreds of Africans.

Let me express my gratitude to our law enforcement and intelligence agencies for a job very well done and to the Kenyan and Tanzanian authorities for their hard work and close cooperation with the FBI.

This is an important step forward in our struggle against terrorism, but there is a long road ahead. The enemies of peace and freedom undoubtedly will strike again. Our resolve must be for the long run. We have and we will continue to use all the tools at our disposal -- law enforcement, diplomacy, and when necessary, America's military might. No matter what it takes, how long it takes, or where it takes us, we will bring to justice those responsible for the murder and maining of American citizens. We will defend our interests, our people, and our values.

LOAD-DATE: September 22, 1998

# ATTACHMENT C

#### 12 of 17 DOCUMENTS

#### Public Papers of the Presidents

October 14, 2000

CITE: 36 Weekly Comp. Pres. Doc. 2464

LENGTH: 751 words

**HEADLINE:** The President's Radio Address

#### **BODY:**

Good morning. This week an apparent terrorist attack claimed the lives of brave American sailors off the coast of Yemen, and new violence erupted between Israelis and Palestinians in the Middle East.

Our sailors aboard the U.S.S. *Cole* were simply doing their duty, but a dangerous duty, standing guard for peace. Yesterday I spoke to the Captain of the *Cole*, Commander Kirk Lippold. On behalf of all Americans, I expressed our deepest sympathies and commended him and his crew for the great job they're doing at this very difficult time.

To our sailors' families, let me say we hold you in our prayers. We will never know your loved ones as you did or remember them as you will, but we join you in grief. For your loss is America's loss, and we bow our heads to God in gratitude for the lives and service of your loved ones.

In their honor, I have ordered that flags be flown at halfstaff in the United States, our territories, our Embassies, military bases, and naval vessels until sunset on Monday. As we see the flag this weekend, we should think of the families and the sacrifice they have made for America.

This tragic loss should remind us all that even when America is not at war, the men and women of our military risk their lives every day in places where comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because the strength of our military is a major reason we are at peace. History will record our triumphs on the battlefield, but no one can ever write a full account of the wars never fought, the losses never suffered, the tears never shed because the men and women of our military were risking their lives for peace. We should never, ever forget that.

Our military power is not all people see when ships of the United States enter a foreign port. When U.S. sailors head down the brow of the ship or our troops set foot on foreign soil, our hosts see in the uniform of the United States men and women of every race, creed, and color who trace their ancestry to every region on Earth, yet are bound together by a common commitment to freedom and a common pride in being Americans.

That image of unity amidst diversity must confound the minds of the hate-filled cowards who killed our sailors. They can take innocent life. They can cause tears and anguish, but they can never heal or build harmony or bring people together. That is work only free, law-abiding people can do.

And that is why we will do whatever it takes, for as long as it takes, to find those who killed our sailors and hold them accountable, and why we will never let the enemies of freedom and peace stop America from seeking peace, fighting terrorism, and promoting freedom. For only by defending our people, our interests, and our values will we redeem the lives of our sailors and ruin the schemes of their killers.

That includes, of course, our efforts to promote peace in the Middle East. The conflict between Israelis and

Palestinians is one of the greatest tragedies of our time and one of the very hardest problems to solve. Every step forward has been marked with pain. Each time the forces of reconciliation have reached out, the forces of destruction have lashed out. The violence we've seen there demonstrates beyond a shadow of a doubt that the alternative to peace is unacceptable, and that no one will gain from an endless contest of inflicting and absorbing pain.

Ending the violence and getting people of the Middle East back to dialog will be hard after what has happened. But no matter how difficult that task may be, no matter how terrible the images of this week's violence, the effort must continue with America's strong support. We must do so because we have a profound national interest in peace in the Middle East and a very special bond to the State of Israel. As in all the world's troubled places, our efforts do not guarantee success. But not to try is to guarantee failure.

So today I ask your prayers for our men and women in uniform, for the families of our fallen sailors, and for all those here and everywhere who hope and work for a world at peace.

Thanks for listening.

Note: The address was recorded at 5:25 p.m. on October 13 in the Roosevelt Room at the White House for broadcast at 10:06 a.m. on October 14. The transcript was made available by the Office of the Press Secretary on October 13 but was embargoed for release until the broadcast.

LOAD-DATE: November 9, 2000

### ATTACHMENT D

#### 7 of 17 DOCUMENTS

#### Public Papers of the Presidents

October 18, 2000

CITE: 36 Weekly Comp. Pres. Doc. 2507

LENGTH: 1239 words

**HEADLINE:** Remarks at the Memorial Service for the U.S.S. Cole in Norfolk, Virginia

#### **BODY:**

The President. Secretary Cohen; General Reno; Secretary Danzig; General Shelton; distinguished Members of the Senate and House; Governor; Admiral Clark; Admiral Natter; Chaplain Black; Master Chief Herdt; Master Chief Hefty; the sailors of the U.S.S. Cole; the family members and friends; the Norfolk naval community; my fellow Americans. Today we honor our finest young people, fallen soldiers who rose to freedom's challenge. We mourn their loss, celebrate their lives, offer the love and prayers of a grateful nation to their families.

For those of us who have to speak here, we are all mindful of the limits of our poor words to lift your spirits or warm your hearts. We know that God has given us the gift of reaching our middle years. And we now have to pray for your children, your husbands, your wives, your brothers, your sisters who were taken so young. We know we will never know them as you did or remember them as you will, the first time you saw them in uniform or the last time you said goodbye.

They all had their own stories and their own dreams. We Americans have learned something about each and every one of them over these last difficult days as their profiles, their lives, their loves, their service have been given to us. For me, I learned a little more when I met with all the families this morning.

Some follow the family tradition of Navy service; others hoped to use their service to earn a college degree. One of them had even worked for me in the White House: Richard Costelow was a technology wizard who helped to update the White House communications system for this new century.

All these very different Americans, all with their different stories, their lifelines and love ties, answered the same call of service and found themselves on the U.S.S. *Cole*, headed for the Persian Gulf, where our forces are working to keep peace and stability in a region that could explode and disrupt the entire world.

Their tragic loss reminds us that even when America is not at war, the men and women of our military still risk their lives for peace. I am quite sure history will record in great detail our triumphs in battle, but I regret that no one will ever be able to write a full account of the wars we never fought, the losses we never suffered, the tears we never shed because men and women like those who were on the U.S.S. *Cole* were standing guard for peace. We should never, ever forget that.

Today I ask all Americans just to take a moment to thank the men and women of our Armed Forces for a debt we can never repay, whose character and courage, more than even modern weapons, makes our military the strongest in the world. And in particular, I ask us to thank God today for the lives, the character, and courage of the crew of the U.S.S. *Cole*, including the wounded and especially those we lost or are missing: Hull Maintenance Technician Third Class Kenneth Eugene Clodfelter; Electronics Technician Chief Petty Officer First Class Richard Costelow; Mess Management Specialist Seaman Lakeina Monique Francis; Information Systems Technician Seaman Timothy Lee Gauna; Signalman Seaman Apprentice Cherone Louis Gunn; Seaman James Rodrick McDaniels; Engineman Second

Remarks at the Memorial Service for the U.S.S. Cole in Norfolk, Virginia Public Papers of the Presidents October 18, 2000

Class Mark Ian Nieto; Electronics Warfare Technician Third Class Ronald Scott Owens; Seaman Apprentice Lakiba Nicole Palmer; Engine Fireman Joshua Langdon Parlett; Fireman Apprentice Patrick Howard Roy; Electronics Warfare Technician Second Class Kevin Shawn Rux; Mess Management Specialist Third Class Ronchester Manangan Santiago; Operations Specialist Second Class Timothy Lamont Saunders; Fireman Gary Graham Swenchonis, Jr; Ensign Andrew Triplett; Seaman Apprentice Craig Bryan Wibberley.

In the names and faces of those we lost and mourn, the world sees our Nation's greatest strength: people in uniform rooted in every race, creed, and region on the face of the Earth, yet bound together by a common commitment to freedom and a common pride in being American. That same spirit is living today as the crew of the U.S.S. *Cole* pulls together in a determined struggle to keep the determined warrior afloat.

The idea of common humanity and unity amidst diversity, so purely embodied by those we mourn today, must surely confound the minds of the hate-filled terrorists who killed them. They envy our strength without understanding the values that give us strength. For for them, it is their way or no way; their interpretation, twisted though it may be, of a beautiful religious tradition; their political views, their racial and ethnic views; their way or no way.

Such people can take innocent life. They have caused your tears and anguish, but they can never heal or build harmony or bring people together. That is work only free, law-abiding people can do. People like the sailors of the U.S.S. *Cole*.

To those who attacked them, we say: You will not find a safe harbor. We will find you, and justice will prevail. America will not stop standing guard for peace or freedom or stability in the Middle East and around the world.

But some way, someday, people must learn the lesson of the lives of those we mourn today, of how they worked together, of how they lived together, of how they reached across all the lines that divided them and embraced their common humanity and the common values of freedom and service.

Not far from here, there is a quiet place that honors those who gave their lives in service to our country. Adorning its entrance are words from a poem by Archibald Macleish, not only a tribute to the young we lost but a summons to those of us left behind. Listen to them.

The young no longer speak, but:

They have a silence that speaks for them at night.

They say: We were young. Remember us.

They say: We have done what we could, but until it is finished, it is not done.

They say: Our deaths are not ours; they are yours; they will mean what you make them.

They say: Whether our lives and our deaths were for peace and a new hope, we cannot say; it is you who must say this.

They say: We leave you our deaths. Give them their meaning.

The lives of the men and women we lost on the U.S.S. *Cole* meant so much to those who loved them, to all Americans, to the cause of freedom. They have given us their deaths. Let us give them their meaning. Their meaning of peace and freedom, of reconciliation and love, of service, endurance, and hope. After all they have given us, we must give them their meaning.

I ask now that you join me in a moment of silence and prayer for the lost, the missing, and their grieving families.

Remarks at the Memorial Service for the U.S.S. Cole in Norfolk, Virginia Public Papers of the Presidents October 18, 2000

[At this point, those gathered observed a moment of silence.]

The President. Amen.

Thank you, and may God bless you all.

Note: The President spoke at 11:38 a.m. on Pier 12. In his remarks, he referred to Gov. James S. Gilmore III of Virginia; Adm. Barry C. Black, USN, Chief of Chaplains, U.S. Navy, who gave the invocation; Master Chief Petty Officer of the Navy James L. Herdt, USN; Master Chief Thomas B. Hefty, USN, U.S. Atlantic Fleet Master Chief. The transcript released by the Office of the Press Secretary also included the remarks of Adm. Robert J. Natter, USN, Commander in Chief, U.S. Atlantic Fleet; Adm. Vern Clark, USN, Chief of Naval Operations; Secretary of the Navy Richard Danzig; Gen. Henry H. Shelton, USA, Chairman, Joint Chiefs of Staff; and Secretary of Defense William Cohen.

LOAD-DATE: November 9, 2000

### ATTACHMENT E





For Immediate Release Office of the Press Secretary September 19, 2001

### Remarks by the President At Photo Opportunity with House and Senate Leadership The Oval Office

<u>View the President's Remarks</u> Listen to the President's Remarks

4:39 P.M. EDT

THE PRESIDENT: I want to welcome the members of the leadership of the Congress here, and I want the nation to know how proud I am of how they have helped unite our country. Senator Daschle and the Speaker and Senator Lott and Representative Gephardt have really showed that in times of emergency and crisis, that our government can function in a way that is just exemplary. And I want to thank them for coming down.

I'm also so pleased to accept the invitation of the Speaker and the leaders to come and address the Congress tomorrow night. I look forward to the opportunity to explaining to the American people who it is and who would do this to our great country, and why -- why would people choose America?

A lot of our citizens have got a lot of questions about what has taken place on September the 11th and subsequent to that. And I owe it to the country to give an explanation. And I want to thank the Congress for giving me a chance. I can't think of a better place than to talk about freedom and the battle to maintain freedom in one of the greatest halls of freedom. And that is in the United States Congress.

So, thank you for the invitation. I accept wholeheartedly, and I will see you all tomorrow night.

I would be glad to answer a couple of questions. Ron?

Q Mr. President, will you be able to tell all Americans whether they're going to be safe while you prepare to retaliate, or could terrorists strike again while we prepare for war?

THE PRESIDENT: Ron, I think America needs to know that we in government are on alert; that we recognize life around the White House or around the Congress is not normal, or is not the way it used to be, because we're very aware that people have conducted an act of war on our country; and that all of us urge our fellow Americans to go back to work and to work hard, but we must be on alert. Our government is working hard to make sure that we run down every lead, every opportunity, to find someone who would want to hurt any American.

The American people are united. They're united in their resolve to help heal the nation. But they're also united in the understanding that we've entered into a new day, and we'll deal with it.

Q Sir, you've been stressing that this is not a war against Islam. However, there are some around the world who view the coming battle along religious lines. I'm wondering how worried you are that some view this as a holy war. And are declarations of jihad at all affecting U.S. plans

THE PRESIDENT: I appreciate that question. First of all, it is so important for my fellow Americans, as well as everybody in the world to understand that America will hold those evil-doers accountable. We don't view this as a war of religion, in any way, shape or form. As a matter of fact, Islam preaches peace. The Muslim faith is a peaceful faith. And there are millions of good Americans who practice the Muslim faith who love their country as much as I love the country, who salute the flag as strongly as I salute the flag.

And for those who try to pit religion against religion, our great nation will stand up and reject that kind of

thought. We won't allow that to creep into the consciousness of the world. We're going to lead the world to fight for freedom, and we'll have Muslim and Jew and Christian side-by-side with us.

Q Mr. President, you promised only to dip into the Social Security surplus in an emergency, a recession, or war. And in your words, this constitutes a war. How much of the Social Security surplus are you prepared to spend?

THE PRESIDENT: We are -- not only has someone conducted an act of war on us, our economy has slowed way down and this is an emergency. We've had all three, it seems like to me. And I'm going to work with Congress to send a clear message to America, American workers, American business people, that this government will respond to this emergency.

We'll respond to the emergency in terms of working on a package for the airline industry that has been severely affected. We'll respond to work to fight terrorism. The Congress has already responded, with a supplemental that will not only help fund our military, but as importantly, will send a clear message to the people of New York and New Jersey and Connecticut that we'll help you rebuild.

And this is exactly the subject we talked about. The definition of how much -- is enough to get America going again as to be able to endure this emergency.

Q And if that means all the surplus, are you prepared to spend all the surplus?

THE PRESIDENT: We're reasonable people. The members here, the leaders from the Congress are very reasonable. And they are mindful about government money as well as anybody else. But we're dedicated, we're dedicated to saying to the American people, this is an emergency, the likes of which we have not seen in a long time in this country, and this government will come together and deal with it. And that's exactly what's going to happen.

Q Sorry to ask another one, but did you mean to say just now that we are in a recession? You said, it looks to me like we've got all three.

THE PRESIDENT: No, I said -- well, I said -- let me put it this way -- tough economic times. There's no question it's tough times. And, Ron, I don't have all the numbers, but let me just say this: I can pick up all the statistics, but make no mistake about it, this has affected our economy in a big way. Now, I've still got faith that we'll recover. The strength of the American economy has always been our entrepreneurial spirit and our workers, and that's still prevalent. But you've seen the statistics on the airlines -- they're beginning to lay off people. Big airline manufacturing companies responding. And this government will respond.

Now, I don't have -- don't get me wrong, I don't have all the numbers at my disposal because they have to start counting them up, but this has shocked our economy. And we're going to respond. And that's exactly what this leadership and I have been talking about.

Q Mr. President, do you feel like you've got the full support of President Musharraf? And how hard is it going to be for him to live up to his pledges, given his domestic situation?

THE PRESIDENT: Well, there's no question that President Musharraf has taken a bold position, which is to say he will work to the extent he can with America and our allies as we deal with the prime suspect in the case. And we appreciate so very much his statement of support.

I said we'll give the President a chance to perform, and I believe he has done -- done so. We will work and consult closely with Pakistan and India to make sure that that part of the world is as stable as can possibly be stable.

Let me say that, in terms of foreign policy and in terms of the world, this horrible strategy has provided us with an interesting opportunity. One of the opportunities is in the Middle East. I'm pleased with the fact that Chairman Arafat and Prime Minister Sharon have taken positive steps toward bringing peace to the region. I think we have an opportunity to refashion the thinking between Pakistan and India. I think there's some interesting

opportunities to shake terrorism loose from sponsor states.

And this government, working with Congress, are going to seize the moment. Out of our tears I said I see opportunity, and we will seek opportunity, positive developments from this horrible tragedy that has befallen our nation.

Thank you all.

THE PRESS: Thank you.

END

4:47 P.M. EDT

#### Return to this article at:

http://www.whitehouse.gov/news/releases/2001/09/20010919-8.html



### ATTACHMENT F





For Immediate Release Office of the Press Secretary September 15, 2001

#### Radio Address of the President to the Nation

Listen to the President's Remarks

THE PRESIDENT: Good morning. This weekend I am engaged in extensive sessions with members of my National Security Council, as we plan a comprehensive assault on terrorism. This will be a different kind of conflict against a different kind of enemy.

This is a conflict without battlefields or beachheads, a conflict with opponents who believe they are invisible. Yet, they are mistaken. They will be exposed, and they will discover what others in the past have learned: Those who make war against the United States have chosen their own destruction. Victory against terrorism will not take place in a single battle, but in a series of decisive actions against terrorist organizations and those who harbor and support them.

We are planning a broad and sustained campaign to secure our country and eradicate the evil of terrorism. And we are determined to see this conflict through. Americans of every faith and background are committed to this goal.

Yesterday I visited the site of the destruction in New York City and saw an amazing spirit of sacrifice and patriotism and defiance. I met with rescuers who have worked past exhaustion, who cheered for our country and the great cause we have entered.

In Washington, D.C., the political parties and both Houses of Congress have shown a remarkable unity, and I'm deeply grateful. A terrorist attack designed to tear us apart has instead bound us together as a nation. Over the past few days, we have learned much about American courage -- the courage of firefighters and police officers who suffered so great a loss, the courage of passengers aboard United 93 who may well have fought with the hijackers and saved many lives on the ground.

Now we honor those who died, and prepare to respond to these attacks on our nation. I will not settle for a token act. Our response must be sweeping, sustained and effective. We have much do to, and much to ask of the American people.

You will be asked for your patience; for, the conflict will not be short. You will be asked for resolve; for, the conflict will not be easy. You will be asked for your strength, because the course to victory may be long.

In the past week, we have seen the American people at their very best everywhere in America. Citizens have come together to pray, to give blood, to fly our country's flag. Americans are coming together to share their grief and gain strength from one another.

Great tragedy has come to us, and we are meeting it with the best that is in our country, with courage and concern for others. Because this is America. This is who we are. This is what our enemies hate and have attacked. And this is why we will prevail.

Thank you for listening.

**END** 

http://www.whitehouse.gov/news/releases/2001/09/20010915.html



## ATTACHMENT G

#### Authorization for Use of Military Force September 18, 2001

Public Law 107-40 [S. J. RES. 23]

#### 107th CONGRESS

#### **JOINT RESOLUTION**

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

#### SECTION 1. SHORT TITLE.

This joint resolution may be cited as the `Authorization for Use of Military Force'.

### SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

- (a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.
- (b) War Powers Resolution Requirements-
  - (1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.
  - (2) APPLICABILITY OF OTHER REQUIREMENTS- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

### ATTACHMENT H





For Immediate Release Office of the Press Secretary September 20, 2001

# Address to a Joint Session of Congress and the American People United States Capitol Washington, D.C.

<u>View the President's Remarks</u> Listen to the President's Remarks

En Español

9:00 P.M. EDT

THE PRESIDENT: Mr. Speaker, Mr. President Pro Tempore, members of Congress, and fellow Americans:

In the normal course of events, Presidents come to this chamber to report on the state of the Union. Tonight, no such report is needed. It has already been delivered by the American people.

We have seen it in the courage of passengers, who rushed terrorists to save others on the ground -- passengers like an exceptional man named Todd Beamer. And would you please help me to welcome his wife, Lisa Beamer, here tonight. (Applause.)

We have seen the state of our Union in the endurance of rescuers, working past exhaustion. We have seen the unfurling of flags, the lighting of candles, the giving of blood, the saying of prayers -- in English, Hebrew, and Arabic. We have seen the decency of a loving and giving people who have made the grief of strangers their own.

My fellow citizens, for the last nine days, the entire world has seen for itself the state of our Union -- and it is strong. (Applause.)

Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done. (Applause.)

I thank the Congress for its leadership at such an important time. All of America was touched on the evening of the tragedy to see Republicans and Democrats joined together on the steps of this Capitol, singing "God Bless America." And you did more than sing; you acted, by delivering \$40 billion to rebuild our communities and meet the needs of our military.

Speaker Hastert, Minority Leader Gephardt, Majority Leader Daschle and Senator Lott, I thank you for your friendship, for your leadership and for your service to our country. (Applause.)

And on behalf of the American people, I thank the world for its outpouring of support. America will never forget the sounds of our National Anthem playing at Buckingham Palace, on the streets of Paris, and at Berlin's Brandenburg Gate.

We will not forget South Korean children gathering to pray outside our embassy in Seoul, or the prayers of sympathy offered at a mosque in Cairo. We will not forget moments of silence and days of mourning in Australia and Africa and Latin America.

Nor will we forget the citizens of 80 other nations who died with our own: dozens of Pakistanis; more than 130 Israelis; more than 250 citizens of India; men and women from El Salvador, Iran, Mexico and Japan; and hundreds of British citizens. America has no truer friend than Great Britain. (Applause.) Once again, we are joined together in a great cause — so honored the British Prime Minister has crossed an ocean to show his unity

of purpose with America. Thank you for coming, friend. (Applause.)

On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars -- but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war -- but not at the center of a great city on a peaceful morning. Americans have known surprise attacks -- but never before on thousands of civilians. All of this was brought upon us in a single day -- and night fell on a different world, a world where freedom itself is under attack.

Americans have many questions tonight. Americans are asking: Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS Cole.

Al Qaeda is to terror what the mafia is to crime. But its goal is not making money; its goal is remaking the world -- and imposing its radical beliefs on people everywhere.

The terrorists practice a fringe form of Islamic extremism that has been rejected by Muslim scholars and the vast majority of Muslim clerics — a fringe movement that perverts the peaceful teachings of Islam. The terrorists' directive commands them to kill Christians and Jews, to kill all Americans, and make no distinction among military and civilians, including women and children.

This group and its leader -- a person named Osama bin Laden -- are linked to many other organizations in different countries, including the Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan. There are thousands of these terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction.

The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world.

Afghanistan's people have been brutalized — many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.

The United States respects the people of Afghanistan -- after all, we are currently its largest source of humanitarian aid -- but we condemn the Taliban regime. (Applause.) It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.

And tonight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. (Applause.) Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. (Applause.) Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. (Applause.) The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.

I also want to speak tonight directly to Muslims throughout the world. We respect your faith. It's practiced freely by many millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah. (Applause.) The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself. The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them. (Applause.)

Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of

global reach has been found, stopped and defeated. (Applause.)

Americans are asking, why do they hate us? They hate what we see right here in this chamber -- a democratically elected government. Their leaders are self-appointed. They hate our freedoms -- our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.

They want to overthrow existing governments in many Muslim countries, such as Egypt, Saudi Arabia, and Jordan. They want to drive Israel out of the Middle East. They want to drive Christians and Jews out of vast regions of Asia and Africa.

These terrorists kill not merely to end lives, but to disrupt and end a way of life. With every atrocity, they hope that America grows fearful, retreating from the world and forsaking our friends. They stand against us, because we stand in their way.

We are not deceived by their pretenses to piety. We have seen their kind before. They are the heirs of all the murderous ideologies of the 20th century. By sacrificing human life to serve their radical visions -- by abandoning every value except the will to power -- they follow in the path of fascism, and Nazism, and totalitarianism. And they will follow that path all the way, to where it ends: in history's unmarked grave of discarded lies. (Applause.)

Americans are asking: How will we fight and win this war? We will direct every resource at our command -- every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war -- to the disruption and to the defeat of the global terror network.

This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat.

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. (Applause.) From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.

Our nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans. Today, dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security. These efforts must be coordinated at the highest level. So tonight I announce the creation of a Cabinet-level position reporting directly to me -- the Office of Homeland Security.

And tonight I also announce a distinguished American to lead this effort, to strengthen American security: a military veteran, an effective governor, a true patriot, a trusted friend -- Pennsylvania's Tom Ridge. (Applause.) He will lead, oversee and coordinate a comprehensive national strategy to safeguard our country against terrorism, and respond to any attacks that may come.

These measures are essential. But the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows. (Applause.)

Many will be involved in this effort, from FBI agents to intelligence operatives to the reservists we have called to active duty. All deserve our thanks, and all have our prayers. And tonight, a few miles from the damaged Pentagon, I have a message for our military: Be ready. I've called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud. (Applause.)

This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.

We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world. The United States is grateful that many nations and many international organizations have already responded — with sympathy and with support. Nations from Latin America, to Asia, to Africa, to Europe, to the Islamic world. Perhaps the NATO Charter reflects best the attitude of the world: An attack on one is an attack on all.

The civilized world is rallying to America's side. They understand that if this terror goes unpunished, their own cities, their own citizens may be next. Terror, unanswered, can not only bring down buildings, it can threaten the stability of legitimate governments. And you know what -- we're not going to allow it. (Applause.)

Americans are asking: What is expected of us? I ask you to live your lives, and hug your children. I know many citizens have fears tonight, and I ask you to be calm and resolute, even in the face of a continuing threat.

I ask you to uphold the values of America, and remember why so many have come here. We are in a fight for our principles, and our first responsibility is to live by them. No one should be singled out for unfair treatment or unkind words because of their ethnic background or religious faith. (Applause.)

I ask you to continue to support the victims of this tragedy with your contributions. Those who want to give can go to a central source of information, libertyunites.org, to find the names of groups providing direct help in New York, Pennsylvania, and Virginia.

The thousands of FBI agents who are now at work in this investigation may need your cooperation, and I ask you to give it.

I ask for your patience, with the delays and inconveniences that may accompany tighter security; and for your patience in what will be a long struggle.

I ask your continued participation and confidence in the American economy. Terrorists attacked a symbol of American prosperity. They did not touch its source. America is successful because of the hard work, and creativity, and enterprise of our people. These were the true strengths of our economy before September 11th, and they are our strengths today. (Applause.)

And, finally, please continue praying for the victims of terror and their families, for those in uniform, and for our great country. Prayer has comforted us in sorrow, and will help strengthen us for the journey ahead.

Tonight I thank my fellow Americans for what you have already done and for what you will do. And ladies and gentlemen of the Congress, I thank you, their representatives, for what you have already done and for what we will do together.

Tonight, we face new and sudden national challenges. We will come together to improve air safety, to dramatically expand the number of air marshals on domestic flights, and take new measures to prevent hijacking. We will come together to promote stability and keep our airlines flying, with direct assistance during this emergency. (Applause.)

We will come together to give law enforcement the additional tools it needs to track down terror here at home. (Applause.) We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act, and find them before they strike. (Applause.)

We will come together to take active steps that strengthen America's economy, and put our people back to work.

Tonight we welcome two leaders who embody the extraordinary spirit of all New Yorkers: Governor George Pataki, and Mayor Rudolph Giuliani. (Applause.) As a symbol of America's resolve, my administration will work with Congress, and these two leaders, to show the world that we will rebuild New York City. (Applause.)

After all that has just passed -- all the lives taken, and all the possibilities and hopes that died with them -- it is natural to wonder if America's future is one of fear. Some speak of an age of terror. I know there are struggles ahead, and dangers to face. But this country will define our times, not be defined by them. As long as the United

States of America is determined and strong, this will not be an age of terror; this will be an age of liberty, here and across the world. (Applause.)

Great harm has been done to us. We have suffered great loss. And in our grief and anger we have found our mission and our moment. Freedom and fear are at war. The advance of human freedom — the great achievement of our time, and the great hope of every time — now depends on us. Our nation — this generation — will lift a dark threat of violence from our people and our future. We will rally the world to this cause by our efforts, by our courage. We will not tire, we will not falter, and we will not fail. (Applause.)

It is my hope that in the months and years ahead, life will return almost to normal. We'll go back to our lives and routines, and that is good. Even grief recedes with time and grace. But our resolve must not pass. Each of us will remember what happened that day, and to whom it happened. We'll remember the moment the news came —where we were and what we were doing. Some will remember an image of a fire, or a story of rescue. Some will carry memories of a face and a voice gone forever.

And I will carry this: It is the police shield of a man named George Howard, who died at the World Trade Center trying to save others. It was given to me by his mom, Arlene, as a proud memorial to her son. This is my reminder of lives that ended, and a task that does not end. (Applause.)

I will not forget this wound to our country or those who inflicted it. I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.

The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them. (Applause.)

Fellow citizens, we'll meet violence with patient justice -- assured of the rightness of our cause, and confident of the victories to come. In all that lies before us, may God grant us wisdom, and may He watch over the United States of America.

Thank you. (Applause.)

END 9:41 P.M. EDT

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http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html

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### ATTACHMENT I





For Immediate Release Office of the Press Secretary October 7, 2001

### Presidential Address to the Nation

The Treaty Room

View the President's Remarks

1:00 P.M. EDT

Listen to the President's Remarks View the President's

Remarks

THE PRESIDENT: Good afternoon. On my orders, the United States En Español military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.

We are joined in this operation by our staunch friend, Great Britain. Other close friends, including Canada, Australia, Germany and France, have pledged forces as the operation unfolds. More than 40 countries in the Middle East, Africa, Europe and across Asia have granted air transit or landing rights. Many more have shared intelligence. We are supported by the collective will of the world.

More than two weeks ago, I gave Taliban leaders a series of clear and specific demands: Close terrorist training camps, hand over leaders of the al Qaeda network; and return all foreign nationals, including American citizens, unjustly detained in your country. None of these demands were met. And now the Taliban will pay a price. By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate their evil plans.

Initially, the terrorists may burrow deeper into caves and other entrenched hiding places. Our military action is also designed to clear the way for sustained, comprehensive and relentless operations to drive them out and bring them to justice.

At the same time, the oppressed people of Afghanistan will know the generosity of America and our allies. As we strike military targets, we'll also drop food, medicine and supplies to the starving and suffering men and women and children of Afghanistan.

The United States of America is a friend to the Afghan people, and we are the friends of almost a billion worldwide who practice the Islamic faith. The United States of America is an enemy of those who aid terrorists and of the barbaric criminals who profane a great religion by committing murder in its name.

This military action is a part of our campaign against terrorism, another front in a war that has already been joined through diplomacy, intelligence, the freezing of financial assets and the arrests of known terrorists by law enforcement agents in 38 countries. Given the nature and reach of our enemies, we will win this conflict by the patient accumulation of successes, by meeting a series of challenges with determination and will and purpose.

Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril.

I'm speaking to you today from the Treaty Room of the White House, a place where American Presidents have worked for peace. We're a peaceful nation. Yet, as we have learned, so suddenly and so tragically, there can be no peace in a world of sudden terror. In the face of today's new threat, the only way to pursue peace is to pursue those who threaten it.

We did not ask for this mission, but we will fulfill it. The name of today's military operation is Enduring Freedom. We defend not only our precious freedoms, but also the freedom of people everywhere to live and raise their children free from fear.

I know many Americans feel fear today. And our government is taking strong precautions. All law enforcement and intelligence agencies are working aggressively around America, around the world and around the clock. At my request, many governors have activated the National Guard to strengthen airport security. We have called up Reserves to reinforce our military capability and strengthen the protection of our homeland.

In the months ahead, our patience will be one of our strengths -- patience with the long waits that will result from tighter security; patience and understanding that it will take time to achieve our goals; patience in all the sacrifices that may come.

Today, those sacrifices are being made by members of our Armed Forces who now defend us so far from home, and by their proud and worried families. A Commander-in-Chief sends America's sons and daughters into a battle in a foreign land only after the greatest care and a lot of prayer. We ask a lot of those who wear our uniform. We ask them to leave their loved ones, to travel great distances, to risk injury, even to be prepared to make the ultimate sacrifice of their lives. They are dedicated, they are honorable; they represent the best of our country. And we are grateful.

To all the men and women in our military -- every sailor, every soldier, every airman, every coastguardsman, every Marine -- I say this: Your mission is defined; your objectives are clear; your goal is just. You have my full confidence, and you will have every tool you need to carry out your duty.

I recently received a touching letter that says a lot about the state of America in these difficult times -- a letter from a 4th-grade girl, with a father in the military: "As much as I don't want my Dad to fight," she wrote, "I'm willing to give him to you."

This is a precious gift, the greatest she could give. This young girl knows what America is all about. Since September 11, an entire generation of young Americans has gained new understanding of the value of freedom, and its cost in duty and in sacrifice.

The battle is now joined on many fronts. We will not waver; we will not tire; we will not falter; and we will not fail. Peace and freedom will prevail.

Thank you. May God continue to bless America.

END 1:07 P.M, EDT

#### Return to this article at:

http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html



## ATTACHMENT J





For Immediate Release Office of the Press Secretary November 13, 2001

**President Issues Military Order** 

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

- (a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.
- (b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).
- (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.
- (d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.
- (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.
- (f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.
- (g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling govern-ment interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
- (i) is or was a member of the organization known as al Qaida;
- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
- (2) it is in the interest of the United States that such individual be subject to this order.
- (b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.
- (c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.
- Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be --
- (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;
- (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.
- Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.
- (a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

- (b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.
- (c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --
- (1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;
- (2) a full and fair trial, with the military commission sitting as the triers of both fact and law:
- (3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;
- (4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;
- (5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;
- (6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being

present;

- (7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and
- (8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.
- Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

- Sec. 6. Additional Authorities of the Secretary of Defense.
- (a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.
- (b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.
- Sec. 7. Relationship to Other Law and Forums.
- (a) Nothing in this order shall be construed to --
- authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;
- (2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or
- (3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.
- (b) With respect to any individual subject to this order --
- (1) military tribunals shall have exclusive jurisdiction with respect

to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

- (c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.
- (d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.
- (e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.

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#### Return to this article at:

http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html



### ATTACHMENT K

### Executive Order 13269 of July 3, 2002

**Expedited Naturalization of Aliens and Noncitizen Nationals Serving in An Active- Duty Status During the War on Terrorism** 

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 329 of the Immigration and Nationality Act (8 U.S.C. 1440) (the "Act"), and solely in order to provide expedited naturalization for aliens and noncitizen nationals serving in an active-duty status in the Armed Forces of the United States during the period of the war against terrorists of global reach, it is hereby ordered as follows:

For the purpose of determining qualification for the exception from the usual requirements for naturalization, I designate as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001. Such period will be deemed to terminate on a date designated by future Executive Order. Those persons serving honorably in active-duty status in the Armed Forces of the United States, during the period beginning on September 11, 2001, and terminating on the date to be so designated, are eligible for naturalization in accordance with the statutory exception to the naturalization requirements, as provided in section 329 of the Act. Nothing contained in this order is intended to affect, nor does it affect, any other power, right, or obligation of the United States, its agencies, officers, employees, or any other person under Federal law or the law of nations.

[signed:] George W. Bush

THE WHITE HOUSE,

July 3, 2002.

# ATTACHMENT L

- [The 803 session was called to order at 0942, 7 February, 2008.]
- 2 MJ: Court's called to order. All parties present when the
- 3 court last recessed are once again present. As near as I can tell,
- 4 it looks like we have two new representatives on the government side.
- 5 Counsel, would you introduce yourselves and state your qualifications
- 6 and status as to oath, please?
- 7 APROS [Mr. Oldham]: Your Honor, my name is Andrew Oldham. I
- 8 have been detailed to the Military Commission by the Chief
- 9 Prosecutor. I'm qualified to serve under RMC 503 and I have
- 10 previously been sworn in accordance with RMC 807. I have not acted
- in any manner that might tend to disqualify me in this proceeding. I
- 12 am a civilian attorney with the Department of Justice.
- MJ: Thank you.
- 14 APROS [Mr. Goldstein]: Your Honor, I am Jordan Goldstein. I
- 15 have been detailed to this Military Commission by the Chief
- 16 Prosecutor. I am qualified to serve under RMC 503 and have been
- 17 previously sworn in accordance with RMC 807. I have not acted in any
- 18 manner that might tend to disqualify me in this proceeding. I'm a
- 19 civilian attorney with the Department of Justice.
- 20 [The court reporter was present, was detailed to the Court-Martial by
- 21 the Convening Authority and was previously sworn.]
- 22 MJ: Very good. Thank you. I noticed that Lieutenant Mizer has
- 23 been promoted to Lieutenant Commander. Congratulations.

15

- 1 plurality's statement or its determination that conspiracy was not a
- 2 violation of the Law of War. The accused is attempting to
- 3 disaggregate the Court's factual findings, if that's what it was,
- 4 from the Court's role in adjudicating particular issues, and that
- 5 doesn't make any sense.
- The Supreme Court's decision in Hamdan was not intended to
- 7 be an encyclopedia of the War of al Qaeda. It was decision intended
- 8 to resolve particular legal issues between the parties, in this case,
- 9 whether conspiracy was a violation of the Law of War. Some facts
- 10 were relevant to that determination and some facts were not. Those
- 11 facts that were irrelevant, such as whether hostilities commenced in
- 12 2001 or 1996 cannot have preclusive affect either on these litigants
- 13 or on any others, because the plurality's statements regarding the
- 14 commencement of hostilities with al Qaeda were irrelevant to the
- 15 ultimate conclusion regarding conspiracy status under the Law of War.
- 16 It was dicta; therefore had no res Judicata affect.
- With respect to our other arguments on res Judicata, we're
- 18 content to rest on our briefs. And we urge the commission to deny
- 19 this motion and I'm happy to take any questions at this point.
- 20 MJ: Well you just used the term "sometime before 9/11" as the
- 21 start date of hostilities, but in your specification you've alleged a
- 22 conspiracy that began in 1996. Does this commission have to

- 1 determine what the start date was and preclude evidence of the
- 2 accused's acts before that start date?
- 3 APROS [Mr. Goldstein]: Well, the government would certainly--I
- 4 guess agrees with the defense that military commissions try
- 5 violations of the Law of War, in other words try offenses committed
- 6 in the context of armed conflicts. It's the government's position
- 7 that this period of armed conflicts included all events in the dates
- 8 alleged so that would be part of the Court's determination, but the
- 9 government's position is that this case goes forward because the
- 10 period of armed conflict includes all the offenses and dates alleged,
- in other words, from February 1996 through November 24, 2001.
- MJ: Is it the government's position that the conflict with al
- 13 Qaeda began a different time than the conflict with the Taliban, and
- 14 that these are two separate conflicts?
- APROS [Mr. Goldstein]: I don't know if the government has taken
- 16 a position in terms of whether the dates of those are co-terminus.
- 17 They might well not be. I mean, the government's charging indicates
- 18 that the armed conflict from which these offenses arose was ongoing.
- 19 But the conflict with Al Qaeda and the Taliban need not have occurred
- 20 at the same time and there's no requirement of that under the MCA or
- 21 just logically.
- 22 MJ: Let me--let me ask you to respond to this and I'll give the
- 23 defense a chance if they'd like to do it as well. The Supreme Court

- 1 was trying to--I guess I don't have a very well-formulated question.
- 2 I'll wave off on that I guess.
- 3 APROS [Mr. Goldstein]: But again, we advanced a number of
- 4 different arguments for why there is no res Judicata effect, but I
- 5 think the simplest one is that even if the plurality is taken on its
- 6 own terms. Even if he had commanded the assent of all nine of the
- 7 Justices, just accepting that, which it obviously he did not; it
- 8 determined that conspiracy was not a violation of the Law of War.
- 9 Government concedes that that is the determination
- 10 plurality makes, and disagrees vigorously with it. That
- 11 determination was not based on whether hostilities began in 1996 or
- 12 2002. There is nothing in Justice Stevens' opinion that would in
- 13 anyway suggest that that date is a relevant one. To the extent that
- 14 the plurality sort of goes off on a detour and has other facts in its
- 15 opinion that are not essential to its conclusions, that might well be
- 16 interesting, but that certainly cannot have preclusive effect.
- 17 Plurality cannot put dicta in and give preclusive affect that is not
- 18 relevant to its conclusions even if it actually had some sort of
- 19 binding effect, which it did not.
- 20 MJ: Well I appreciate your argument. Thank you.
- 21 APROS [Mr. Goldstein]: Thank you.
- 22 MJ: I'll read your briefs carefully in the case decided and try
- 23 to work through this one as well.

- 1 We're making pretty good progress. Are we ready for the
- 2 next one?
- 3 ADDC [Mr. Swift]: Yes, Your Honor.
- 4 [Defense paralegal and counsel set up laptop at podium.]
- 5 ADDC [Mr. Swift]: A matter of house-keeping, Your Honor. With
- 6 regards, and understanding where your questions are going in the
- 7 event we of course argued you don't need to, but in the event that
- 8 you find something we both agree on. You find that it's not res
- 9 Judicata you're not bound your decision. We would--if Your Honor
- 10 wants briefs on when the war started irrespective of res Judicata,
- 11 what authorities and all hold--there's a lot out there--and would
- 12 invite us to brief, we would be willing to do so on that subject. It
- 13 was not directly in mind because I was arguing it as a matter of
- 14 procedure, but both sides do agree----
- MJ: The thought--the thought did occur to me that maybe
- 16 September 1 or some period before 9/11 but I don't know how far
- 17 before might be the time when the attack was swarming, so that the
- 18 period of hostilities clearly began, you know, at some vague date
- 19 before September 11. I don't know----
- 20 ADDC [Mr. Swift]: Your responding----
- 21 MJ: You're welcome.
- 22 ADDC [Mr. Swift]: ----to add to your----
- 23 MJ: Submit your supplemental briefs on that if you----

Lt

- 1 ADDC [Mr. Swift]: ----certainly.
- 2 MJ: ----like. I guess I don't know----
- 3 ADDC [Mr. Swift]: ---actually, it's some case law----
- 4 MJ: ---if I have to decide when the conflict began so that the
- 5 specification reads not 1996 but 1998 or 1999 or--or not. Well let's
- 6 see how that res Judicata motion works out and then maybe we can take
- 7 up----
- 8 PROS [LTC Britt]: Your Honor, if I could just speak for a brief
- 9 bit on that. We'd like to decline the opportunity to brief this
- 10 issue, because we don't believe that resolution of that particular
- 11 point is necessary for your determination in our case.
- 12 MJ: You know I think that's true.
- PROS [LTC Britt]: And the reason is, is we're simply contending
- 14 that Mr. Hamdan entered into the ongoing conspiracy as of the date
- 15 alleged. And that----
- 16 MJ: February 96.
- 17 PROS [LTC Britt]: Yes, sir. And therefore hostilities were
- 18 ongoing as of that date whether or not hostilities were going
- 19 previously and as of what date the hostilities commenced is not
- 20 relevant to your determination.
- 21 MJ: What happened in February of 96 that represented the
- 22 beginning of hostilities?
- 23 [Prosecution counsel conferring.]

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- 1 MJ: Let me whisper to counsel.
- 2 PROS [LTC Britt]: Yes, sir. Thank you. I think we can
- 3 adequately address the, the Court's question. In February of 1996,
- 4 that was essentially the date when Mr. Hamdan entered Afghanistan,
- 5 and therefore that would be the date that we contend that he joined
- 6 the ongoing hostilities which were taking place. So that's the
- 7 significance of us choosing that particular date.
- 8 MJ: Okay.
- 9 ADDC [Mr. Swift]: We would really like to brief that if the
- 10 court finds not res Judicata, the war started with Mr. Hamdan by him
- 11 entering Afghanistan at a time--I would like to brief that, Your
- 12 Honor. And whether that's within the jurisdiction of this court?
- 13 MJ: I don't think the government said Mr. Hamdan started the
- 14 war when he crossed into Afghanistan. I think they allege that there
- 15 was an ongoing conspiracy to join on that date.
- 16 PROS [LTC Britt]: Yes, sir. That's correct.
- 17 MJ: Were there hostilities? Had there been an attack prior to
- 18 February of 96?
- 19 PROS [LTC Britt]: Our position would be there had been several
- 20 attacks prior to that and I think that's part of our case, is
- 21 developing what constituted hostilities at that time, but I don't, I
- 22 don't----

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From: McMillan, Joseph M. (Perkins Coie)

**Sent:** Friday, March 07, 2008 4:13 PM

To: ; Britt, William, LTC, DoD OGC; Prasow, Andrea, Ms, DoD

OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; Murphy, John, Mr, DoD

OGC

Cc: , DoD OGC;

Morris, Lawrence, COL, DoD OGC; Schneider, Harry (Perkins Coie); Trivett, Clayton, Mr, DoD

OGC;

**Subject:** Defense Supplemental Brief re Date of Start of War (D016)

Attachments: 14049823\_1.DOC; DefenseMotion.pdf; AttachmentsA-L.pdf



Attached for filing in the matter *United States v. Hamdan* is the Defense Supplemental Brief regarding the Date of the Start of the War (supplemental to the Defense *res judicata* motion to dismiss charges involving pre-war conduct, D016). The brief is attached in both Word and pdf format (the pdf version is signed), and the Exhibits to the brief are attached in a separate pdf.

Thank you.



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From: Prasow, Andrea, Ms, DoD OGC

**Sent:** Tuesday, March 04, 2008 3:59 PM

To:

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC;

, DoD OGC; McMillan, Joseph M. (Perkins

Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Subject: U.S. v. Hamdan - Defense Notice of Intent to File Supplemental Brief

Signed By:

LTC

The Defense hereby provides notice to the military commission and opposing counsel that, in accordance with the invitation of the Military Judge at the 7 February 2008 hearing, it intends to submit supplemental briefing on the date of the start of the war (relevant to D016) by no later than Friday, 7 March 2008. (See unofficial transcript of 7 Feb. 2008 hearing at p. 138.)

Thank you, AJP

Andrea J. Prasow Office of the Chief Defense Counsel Office of Military Commissions

#### UNITED STATES OF AMERICA

**Defense Motion** 

v.

to Dismiss Specification 1 of Charge I (Conspiracy)

#### SALIM AHMED HAMDAN

11 March 2008

- 1. <u>Timeliness</u>: This motion is filed within the time frame established by the Military Commissions Trial Judiciary Rules of Court and this Court's orders dated 20 December 2007 and 15 February 2008. This motion is based on oral statements and representations made by the Prosecution, and heard by the Defense for the first time, in open court at the 7 February 2008 hearing and on written statements made in the Prosecution's subsequent 28 February 2008 Motion for Reconsideration of the Military Judge's 13 February 2008 Ruling on Motion to Compel Access to High Value Detainees D 011, and thus could not have been filed prior to this time.
- 2. Relief Sought: Defendant Salim Ahmed Hamdan moves to dismiss Specification 1 of Charge I (Conspiracy).
- 3. Overview: The Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), precludes Mr. Hamdan from being tried for conspiracy as it has been charged in Specification 1. The term "conspiracy" has a well-established meaning in military law and the elements of the offense are clearly set forth in the MCA, consistent with that well-established meaning. 10 U.S.C. § 950v(b)(28). Under the MCA, conspiracy consists of two elements: (1) an agreement to commit an offense, and (2) an overt act done by the accused in furtherance thereof. *Id.* Yet, in this case, the Prosecution concedes that Mr. Hamdan is not being prosecuted for any alleged involvement in terrorist attacks or the planning of terrorist attacks. The Prosecution has acknowledged that Mr. Hamdan "is not charged with specific involvement

with specific terrorist attacks or discrete terrorist activities." P004-Government's Motion for Reconsideration of Ruling on Motion to Compel Access to High Value Detainees ("Gov't Mot. for Reconsideration") at 5. Rather, "the charges in this case are premised on Mr. Hamdan's *membership* in al Qaeda and his *affiliation* with al Qaeda's leader, Osama bin Laden." *Id.* at 6 (emphases added). Thus, Specification 1, which alleged an agreement to attack and murder civilians and to destroy civilian property and engage in terrorism, must be dismissed.

Nor can Mr. Hamdan be prosecuted for merely being a *member* of al Qaeda or being *affiliated* with al Qaeda's leader, Osama bin Laden. To restate, the MCA requires (1) an agreement to offend, and (2) an overt act in furtherance of that agreement. However, in the Manual for Military Commissions (MMC), the Secretary of Defense has purported to define "conspiracy" to include "join[ing] an enterprise of persons who shared a common criminal purpose." *See* ¶ 5(28), Part IV, MMC (2007). But Congress did not criminalize "join[ing] an enterprise of persons who shared a common criminal purpose," and the Secretary's attempt to unilaterally add this alternative definition of the crime of conspiracy to 10 U.S.C. § 950v(b)(28) is void *ab initio*. Mr. Hamdan cannot be prosecuted for conspiracy under the MCA based on mere membership and affiliation.

4. <u>Burden and Standard of Proof</u>: The burden of persuasion on this motion rests with the moving party. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); Rule for Military Commissions (R.M.C.) 907.

#### 5. Facts:

A. Specification 1 of Charge I (Conspiracy) alleges that Mr. Hamdan entered into an agreement with Osama bin Laden and the top leadership of al Qaeda to attack civilians and civilian objects, to commit murder in violation of the law of war, to destroy property in violation of the law of war, and to generally engage in terrorism. Charge Sheet, 10 May 2007, at 3. (Attachment A.)

- B. The Prosecution has produced to the Defense in discovery approximately 3000 pages of materials related to the attacks on the American Embassies in Kenya and Tanzania, the attack on the USS Cole, and the attacks of September 11, 2001.
- C. Although discovery is not yet complete, the Prosecution has not yet produced a single document or witness that would substantiate an agreement between Mr. Hamdan and Osama bin Laden to engage in terrorism, commit murder, or attack civilians and their property.
- D. In open court on 7 February 2008, the Prosecution, during argument regarding access to seven so-called high-value detainees, stated that the Prosecution has not alleged that Mr. Hamdan was involved in the planning of the attacks against the American Embassies in Kenya and Tanzania, the attack on the USS Cole, or the attacks of September 11, 2001: "I'll moot that right now. We don't contend that Mr. Hamdan was in the planning cell for the attacks in East Africa Embassy bombings. We don't allege that Mr. Hamdan was in the planning cell for the attack on the COLE and certainly we do not contend that Mr. Hamdan was in the planning cell for the attacks in New York City and the Pentagon on the 11th of September." Unofficial Transcript, 7 February 2008 Hearing, at 198:13-19; see also id. at 200:18-20 ("Again, we are not contending that Mr. Hamdan planned and was involved in planning or executing any of the actions which I previously stated."), 204:10-13 ("We would contend the evidence will show that Mr. Hamdan did not have advanced knowledge of that specific incident that occurred on September the 11th, though he did in fact know some big event, perhaps an attack, was looming prior to September the 11th."), 204:21-32 ("Again, we do not contend that Mr. Hamdan was a member of the planning cell on any of the attacks that occurred against the United States coalition—American or coalition interests."), 206:20-21 ("[W]e never alleged he was a member of the planning and execution cell of al Qaeda."). (Attachment B.)
- E. In its 29 February 2008 Motion for Reconsideration, the Prosecution went even further: "The accused is not charged with having foreknowledge of the attacks of September 11th, nor is the accused charged with conspiring in or supporting those attacks." Gov't Mot. for Reconsideration at 1. "[T]he Government has not charged Hamdan with having foreknowledge of September 11th, nor has the Government charged him with having conspired or participated in the execution of those attacks." Gov't Mot. for Reconsideration at 4. "Hamdan is not charged with specific involvement with specific terrorist attacks or discrete terrorist activities." Gov't Mot. for Reconsideration at 5.
- F. In support of Specification 1 of Charge I, the Prosecution appears to be solely relying upon allegations that Mr. Hamdan "join[ed] an enterprise of persons know as al Qaeda . . . shar[ing] a common criminal purpose . . . . " Charge Sheet at 3.

## 6. <u>Law and Argument:</u>

- A. Specification 1 of the Conspiracy Charge Fails Under the Traditional and Statutorily Required Elements of Conspiracy
  - 1. The Crime of Conspiracy Consists of an Agreement to Commit an Offense and an Overt Act by the Accused in Furtherance of the Conspiracy

Congress criminalized the offense of conspiracy in § 950v(b)(28) of the MCA:

Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished . . . as a military commission under this chapter may direct.

The crime of conspiracy under the MCA is nearly identical to the crime of conspiracy set forth in Article 81, UCMJ, 10 U.S.C. § 881:

Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

Although it is nearly identical, the MCA crime of conspiracy is narrower than its UCMJ counterpart because it requires that the charged co-conspirator himself commit an overt act in furtherance of the conspiracy.

The crime of conspiracy is not new, either to military or civilian criminal law. It is an "agreement to violate the law." *United States v. Blankenship*, 970 F.2d 283, 285 (7th Cir. 1992). As stated by the Supreme Court, "[t]he gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *United States v. Falcone*, 311 U.S. 205, 207 (1940). "The essential element of the offense of conspiracy is that there is an agreement with one or more persons to commit a criminal act." *United States v. Jones*, 36 M.J. 778, 779 (A.C.M.R. 1993); *see also United States v. Pretlow*, 13 M.J. 85, 88 (C.M.A. 1982) ("Conspiracy is an offense requiring an agreement between two or more persons to commit *another* offense recognized by

the Uniform Code of Military Justice and the doing of an act to effect the agreement."). Importantly, conspiracy requires intent to join the conspiracy, not mere presence or proximity when a crime is committed. *United States v. Mukes*, 18 M.J. 358, 359 (C.M.A. 1984). "Mere association with co-conspirators or knowledge of their illegal activity is not enough to establish a defendant's agreement to participate in the conspiracy." *United States v. Williams*, 203 Fed. Appx. 976, 988 (11th Cir. 2006).

Conspiracy to commit "a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. 672, 678 (1959) (emphasis in original). "No person should be convicted of conspiracy to commit a given crime without proof that he personally possessed that degree of criminal purpose." *United States v. Harrelson*, 766 F.2d 186, 188 (5th Cir. 1985); *United States v. Wright*, 42 M.J. 163, 165 (C.A.A.F. 1995). For example, "one cannot be convicted of conspiracy to commit first degree murder without being found to have entertained the gravest of criminal intents: premeditation and malice aforethought." *Harrelson*, 766 F.2d at 188.

2. The Prosecution Concedes That It Will Not Prove That Mr. Hamdan Agreed to Commit an Offense, Committed an Overt Act in Furtherance of That Agreement, or Had the Requisite Specific Intent

Specification 1 of Charge I alleges that Mr. Hamdan conspired with Osama bin Laden and others to commit "one or more substantive offenses subject to trial by military commission, to wit: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism." Charge Sheet at 3. For this charge to be valid, the Prosecution must prove all three statutorily required elements for at least one of these objects. For example, to be convicted of conspiracy to commit murder in violation of the law of war, the Prosecution must prove beyond a reasonable doubt:

- (1) Mr. Hamdan entered into an agreement with Osama bin Laden and his associates to commit murder in violation of the law of war; and
- (2) Mr. Hamdan committed an overt act in furtherance of that agreement; and
- (3) Mr. Hamdan possessed the specific intent to commit murder required by 10 U.S.C. § 950v(15).

But the Prosecution concedes that Mr. Hamdan had no "foreknowledge" of the attacks in which individuals were murdered in violation of the law of war. Gov't Mot. for Reconsideration at 1. In fact, the Prosecution goes so far as to say that Mr. Hamdan was not even involved in the planning or execution of terrorist attacks. Gov't Mot. for Reconsideration at 4. "[W]e note that Hamdan is not charged with specific involvement with specific terrorist attacks or discrete terrorist activities." Gov't Mot. for Reconsideration at 5. The same is true for the other objects of the conspiracy alleged in Specification 1, which similarly are based on the embassy bombings, the USS Cole attack, the attacks of September 11, 2001, and "other, separate attacks." Charge Sheet at 3.

In short, the Prosecution concedes every element of conspiracy. The Prosecution concedes Mr. Hamdan never entered into an agreement to commit any offense with Osama bin Laden and that he never performed an overt act in furtherance of the non-existent agreement with the requisite specific intent required for an underlying offense. Instead, the Prosecution insists, the "charges in this case are premised on Hamdan's membership in al Qaeda and his affiliation with al Qaeda's leader, Osama bin Laden." Gov't Mot. for Reconsideration at 6. The Prosecution correctly notes that Mr. Hamdan traveled to the border of Tajikistan with a group of "Gulf Arabs" many of whom later became the "founding members of al Qaeda." Gov't Mot. for Reconsideration at 5. But the crime of conspiracy cannot be established by traveling with someone, associating with someone, or even by joining an organization.

"A defendant cannot be convicted of conspiracy merely on the grounds of guilt by

association, and mere association with the members of a conspiracy without the intention and agreement to accomplish an illegal objective is not sufficient to make an individual a conspirator." *United States v. Lee*, 991 F.2d 343, 348 (6th Cir. 1993). Even if Mr. Hamdan joined al Qaeda to serve as a multi-purpose driver on Osama bin Laden's farms and in his motor pool, without proof that he joined to further Osama bin Laden's goal of, for example, murder in violation of the law of war and that he possessed the requisite intent to commit murder in violation of the law of war, he cannot be convicted of conspiracy. *United States v. Grassi*, 616 F.2d 1295, 1301 (5th Cir. 1980) ("Conspiracy law is not a dragnet for apprehending those with criminal dispositions."). For example, in *United States v. Gomez*, 776 F.2d 542, 549 (5th Cir. 1985), the Fifth Circuit reversed a conspiracy conviction for insufficiency of the evidence. The charge was conspiracy to possess with intent to distribute marijuana. *Id.* at 544. Merely driving and spending some time with the principals was insufficient to show that the defendant knew about or participated in the conspiracy:

Examining the facts in this case in the light most favorable to the government, nothing more has been done than to place Espinoza in some very bad company. The key link in the government's evidence that is missing as to Espinoza is that he *knew* drugs were in the truck picked up by Gomez and delivered to Hartman. The government has proven only that Espinoza chauffered Gomez and Hartman, who were involved in a conspiracy, and spent some time in a motel room with these individuals. A reasonable jury simply could not conclude beyond a reasonable doubt from these facts that Espinoza had the required knowledge. Espinoza's convictions must therefore be reversed.

Id. at 549. The same is true for Mr. Hamdan.

B. Specification 1 of the Conspiracy Charge Also Fails Because Congress Did Not Criminalize the Joining of an "Enterprise of Persons Sharing a Common Criminal Purpose"

Having conceded that it does not intend to prove any of the statutorily required elements of conspiracy, the Prosecution appears to be relying solely on the Manual for Military Commissions, which purports to create the new offense of joining a common criminal enterprise.

This attempt fails because no such offense is authorized by the MCA.

The elements of conspiracy under the UCMJ are set forth in Part IV of the Manual for Courts-Martial:

- (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
- (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

See ¶ 5b, Part IV, MCM (2005). Given that the crime of conspiracy under § 950v(b)(28) differs from its UCMJ counterpart only in the requirement that the accused himself perform the overt act, one would expect the elements of conspiracy set forth in the Manual for Military Commissions to be nearly identical the elements set forth in the Manual for Courts Martial.

Inexplicably, the Manual for Military Commissions sets forth elements of the crime of conspiracy that have no basis in either the MCA or the UCMJ:

- (1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;
- (2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and
- (3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement *or enterprise*.

See ¶ 5(28), Part IV, MMC (2007) (emphases added). The Secretary of Defense, not Congress, criminalized the highlighted language above.

Nothing in the plain language of § 950v(b)(28) or in the legislative history of the MCA suggests that Congress intended to more broadly define the offense of conspiracy. In fact, by requiring that an overt act be done by the accused himself, and not simply by any member of the

conspiracy, the MCA reflects a congressional intent to narrow the offense of conspiracy. The attempt by the Secretary of Defense to add elements to the crime of conspiracy is a legal nullity.

The C.A.A.F. has routinely disregarded Part IV of the Manual for Courts-Martial when it conflicts with the statutory language of the UCMJ. See e.g., United States v. Pritt, 54 M.J. 47, 50 (C.A.A.F. 2000). Indeed, the President's interpretations of substantive offenses in Part IV of the Manual for Courts Martial "are not binding on the judiciary, which has the responsibility to interpret substantive offenses under the Code." United States v. Czeschin, 56 M.J. 346, 349 (C.A.A.F. 2002). "[I]t is beyond cavil that Manual explanations of codal offenses are not binding on this Court." United States v. Gonzalez, 42 M.J. 469, 474 (C.A.A.F. 1995); United States v. Mance, 26 M.J. 244, 252 (C.M.A. 1988). Statutory rules are paramount, unless a lower source of authority like the Manual creates rules that provide greater rights for an accused. United States v. Davis, 47 M.J. 484, 485-86 (C.A.A.F. 1998).

In this case, the Manual provision concerning conspiracy, which purports to add additional elements to the plain statutory language contained in the MCA, should be given no weight. Had Congress intended to prohibit the crime of joining a common criminal enterprise it could have done so. Instead, it codified the well-established crime of conspiracy. "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *United States v. Guess*, 48 M.J. 69, 71 (C.A.A.F. 1998) (internal citation omitted). This Court should look to the Manual for guidance only if the statutory language is ambiguous. *Id.* The Manual provisions in this case are not an attempt by the Secretary of Defense to clarify ambiguous statutory provisions that have remained unchallenged and undisturbed in the UCMJ since 1950. Rather, the Manual provisions are an attempt to broaden the crime of conspiracy without input from Congress.

# C. Membership in Al Qaeda, Even if Proven by the Prosecution in This Case, Is Insufficient as a Matter of Law to Establish a Criminal Conspiracy

In 1940, Congress passed the Smith Act, which made it a criminal offense for anyone to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the United States by force or violence. 18 U.S.C. § 2385 (1940). During the McCarthy era, the Smith Act was used by the Federal Government to prosecute members of the Communist Party. At the time, the "Communist Party [was] a group bent on overthrowing the Government by force and violence . . . and establishing a totalitarian dictatorship in the United States." *Scales v. United States*, 367 U.S. 203, 281 (1961) (Brennan, J., dissenting).

In Scales, the Supreme Court stated:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause.

Id. at 224-25. The Court recognized that a person who is merely a member of an organization does not necessarily share in the community of intent of the organization. The Court required "proof that [the accused] knew that the organization engages in criminal advocacy, and that it was his purpose to further that criminal advocacy." Id. at 226 n.18. The Supreme Court affirmed the conviction of one member of the Communist Party because he had actively and knowingly participated in the group engaged in criminal conduct, intending to contribute to the success of its illegal activities. Id. at 227-28. "The critical element in Scales' analysis was the existence of a community of illicit intent between the individual held responsible for the criminal act of others, and the actual perpetrators of those crimes. That shared purpose to achieve jointly held illegal aims is the common thread among the diverse doctrines of vicarious criminal

responsibility." Ferguson v. Estelle, 718 F.2d 730, 736 (5th Cir. 1983).

Like joining the Communist Party, merely joining al Qaeda is not a crime. "It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that 'act' alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing." *Scales*, 367 U.S. at 228. The Prosecution concedes that Mr. Hamdan had no "foreknowledge" of terrorist activities. And while the Prosecution may argue that Mr. Hamdan may have later learned that a small minority of the al Qaeda membership had engaged in terrorist activities, there is no evidence that Mr. Hamdan intended to support these activities.

"[G]uilt is personal . . . ." *Id.* at 224. For that reason, a showing by the Prosecution that Mr. Hamdan is a member of al Qaeda or a driver in Osama bin Laden's motor pool is hardly "inculpatory." Gov't Mot. for Reconsideration at 4. Without proof that Mr. Hamdan specifically agreed to further Osama bin Laden's terrorist activities, and performed an overt act to carry out that joint intent, the Prosecution's case evaporates into nothing more than an improper effort to establish guilt-by-association, precisely the approach rejected by the Supreme Court in *Scales*. Congress has not criminalized mere membership in al Qaeda. Rather, "[1]imiting criminal responsibility solely to an individual (including a member of al Qaeda or the Taliban, or associated forces) who actually "engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its coalition partners" appears to be the clear intent of Congress, and requires more than mere membership in an organization for criminal responsibility to attach." *United States v. Khadr*, No. 07-001, at 14 (C.M.C.R. Sept. 24, 2007). Thus, the novel "joining an enterprise" alternative promulgated in the Manual for Military

Commissions, which is the entire basis for Specification 1 of the Conspiracy charge here, departs from the intention of Congress, the plain language of the MCA, and the well-established meaning of the crime of conspiracy in our legal tradition. For these reasons, Specification 1 of the Conspiracy charge should be dismissed.

- 7. Request for Oral Argument: The Defense requests oral argument to allow for thorough consideration of the issues raised by this motion. RMC 905(h) provides: "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."
- 8. Request for Witnesses: The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution's response raise issues requiring rebuttal testimony.
- 9. <u>Conference with Opposing Counsel</u>: The Defense has conferred with opposing counsel. The Prosecution objects to the requested relief.

## 10. Attachments:

- A. Charge Sheet, 10 May 2007
- B. Selected pages from Unofficial Transcript, 7 February 2008 Hearing

Respectfully submitted,

By: M. M. M. L. MIZER, JAGC, USN

Detailed Defense Counsel ANDREA J. PRASOW

Assistant Defense Counsel



PROF. CHARLES SWIFT Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR. JOSEPH M. MCMILLAN Perkins Coie LLP

# **ATTACHMENT A**

CHARGE SHEET	
I. PERSONAL DATA	
1. NAME OF ACCUSED: SALIM AHMED HAMDAN (hereafter "Hamdan")	
2. ALIASES OF ACCUSED: Salim Ahmad Hamdan, Salem Ahmed Salem Hamdan, Saqr al Jadan	wy, Saqr al Jaddawi, Khalid bin Abdalla,
Khalid wl'd Abdallah	
3. ISN NUMBER OF ACCUSED (LAST FOUR):	and the second s
II. CHARGES AND SPECIFICAT	rions
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF	
SPECIFICATION: (See Attached Charge Sheet)	
III. SWEARING OF CHARGE	
58. NAME OF ACCUSER (LAST, FIRST, MI) 5b. GRADE	
	OMC-PROSECUTION
	Se. DATE (YYYYMMDD)
	20070405
	es of this character, personally appeared the above named
subject to the Uniform Code of Military Justice and that he/she has personal knowled that the same are true to the best of his/her knowledge and belief.	rges and specifications under oath that he/she is a person ige of or has investigated the matters set forth therein and
WILLIAM B. BRITT	OMC PROSECUTION
Typed Name of Officer	OMC-PROSECUTION Organization of Officer
	<u> 10 U</u> .S.C. 1044(b)
Grado D	Official Capacity to Administer Oath see R.M.C. 307(b) must be commissioned officer)
(5)	оо п.м. О. эот (о) тива на выптиваютей отсет)

MC FORM 458 JAN 2007

	. IV	/. NOTICE TO THE ACCUSED	
6. On 5th April	2007	the accused was notified of the charges against him/he	(See R.M.C. 308).
LTC WILLIAM B.	BRITT	OMC-PROSECT	JTION
Typed Name and Grade of Pe Accused to Be Notified	rson Who Caused	Organization of the Person Accused to Be Notified	Who Caused
		·	
	V, RECEIPT O	F CHARGES BY CONVENING AUTHORITY	
7. The sworn charges were received at	1411 hours,	on 6 April 2007 at Arlington	n, Virginia
· · · · · · · · · · · · · · · · · · ·		Location	·
			•
	For the Conver	ning Authority	
			· · · · · · · · · · · · · · · · · · ·
			·
	<u></u>	VI. REFERF	***
Convening Authority	y 10USC §	948h Arlington, Virginia	8c. DATE (YYYYMMDD) 20070510
Convening Authority Appointed on 6 Feb	y 10USC §9 2007	948h Arlington, Virginia	20070510
Convening Authority Appointed on 6 Feb Referred for trial to the (non)capital mil	y 10USC §9 2007		20070510
Convening Authority Appointed on 6 Feb	y 10USC §9 2007	948h Arlington, Virginia  onvened by military commission convening order 07-	20070510
Convening Authority Appointed on 6 Feb  Referred for trial to the (non)capital mil  dated 1 May 2007	y 10USC §9 2007	948h Arlington, Virginia	20070510
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MC FORM 458 JAN 2007

18

UNITED STATES OF AMERICA	) ) <u>CHARGES</u>
	) Compliany
	) Freviding Material ) Support for Terrorism
SALIM ARMBO HAMIDAN (hereefor "Heridan")	

#### CHARGE I: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

Specification 1: In that Handan, a person subject to trial by military commission as an elien uniaviui enemy-cocabatam, did... in Afiskacintsa and etheraconecias, from in or about February 1996 to on or short November 24, 2001, conspire and supes with Usaima hin Laden, Saiful Adel, Aymsa al Kawahad. Shedeb Suyeed al hiseri, hidamuund Atel (aik/a Abu Hafi al Masell, belifed Adel and verture members and associate, known and pultypern, of the al Quade organization self joks as colorprise of persons known as all Quees, and said al Quede copaged in heatifules against the United Status, including the 1998 attack against the Argerican Embassies in Kenya and Tangguia, the 2000 attack agrees the USS Cole, the Sentember 11, 2004 attack applies the Oplied States and other, replace attacks, continuing to d we and the aforest-calonies remaded wit associates of all Queen chared a common criminal portices first trevolved for consistsion or burnded communicion of one or more substantive offences subject to the hyperlikery concentration, to wit executing civilizations stacking civilizaobjects, negliger in violeties of the law of your destruction of properly in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism and versald Hamaisa lanew the unlawful purpose of the agreement and the common criminal postpose of the enterprise and it rest writidly with the latest to further statement of unlawful property, and in order to aranuplish some charilya al paspase of lag egipericut de essercites. **Hamda**n kaowingiy cramited at least one of the following arost sots:

#### a. Hamdan served as bodyguard for Usama Bin Laden;

- b: Fiamdau served as Usano: Bio Laden's personal driver;
- Heridau transported and delivered watagons, assumation or other supplies to at Quada members and associates;

Continuation of MC Form 458 Chargos and Specifications Fage 5 of 7

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#### United States v. Hamdan

- d. Hamdan drove or accompanied Usama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures.
  - e. Hamdan, on various occasions, received weapons training in Afghanistan.

Specification 2: In that Hamdan, a person subject to trial by military commission as an alice unlawful commy combanate, did, in Alghanistan, on or about November 24, 2001, willfully enter into an agreement with one or more knewn or unknown members of al-Qaada or Taliban to commit the offense of library commission, to wit; for newder of United States or Coalition service members serving as pilots, crow or pessengers of United States or Coalition military aircraft, knowing the unlawful purpose of said agreement and joining into said agreement willingly with the intent to further said unlawful purpose, knowingly commit are overt act in order to accomplish some objective or purpose of said agreement, to will transporting one or region 8A-7 surface to air missiles to be ultimately used to unlawfully and intentionally kill said United States or Coalition service members.

# CHARGE II: VIOLATION OF 10 U.S.C. §950v(b)(25) – PROVIDING MATERIAL SUPPORT FOR TERRORISM

Specification It has the ideal standar, a passon addient to take by military commission as an effectualistic contribution of the interest of the massociated with an armed conflict, a total a massociated with an armed conflict, a total massociated support and reconves to with passonnel, blastelf, to be used to preparation for a configuration and entire of terrorism, and that the said blandar large the kind material support of resources were to be used for its act of terrorism, by joining the reconstructualization known as at Quada and performing to leave one of the following:

- a. Received training at an al Qaeda training camp;
- b. Served as a driver for Usama bin Laden transporting him to various locations in Afghanistan;
- c. Served as Usama bin Laden's armed bodyguard at various locations throughout Afghanistan;

Continuation of MC Form 458 Charges and Specifications Page 4 of 7

M

#### United States v. Hamdan

d. Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates.

Specification 2: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in context of or associated with an armed conflict and with knowledge that al Queda has engaged in or engages in terrorism, did provide material support or resources, to wit: personnel, himself, to al Queda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Queda, by becoming a member of the organization and performing at least one of the following:

- a. Received training at an al Queda training camp;
- b. Served as a driver for Usama bin Laden transporting him to various locations in Afghanistan;
- c. Served as Usama bin Laden's armed bodyguard at various locations throughout Afghanistan;
- d. Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates.

Specification 3: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: weapons and weapons systems, to wit; one or more SA-7 surface to air missiles, to be used in preparation for or carrying out an act of terrorism, and the said Hamdan knew these missiles were to be used for an act of terrorism, by joining the terrorist organization known as al Qaeda and knowingly providing one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations.

Specification 4: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, has engaged in or engages in terrorism, did provide material support or resources, to wit.

Continuation of MC Form 458 Charges and Specifications Page 5 of 7

AE 124 (Hamdan)

#### United States v. Hamdan

weapons and weapons systems, to wit; one or more SA-7 surface to air missiles to al Qaeda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Qaeda, by knowingly providing one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations.

Specification 5: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: service or transportation by serving as a driver for Usama bin Laden by transporting him to various locations in Afghanistan knowing that by providing said service or transportation he was directly facilitating communication and planning used for an act of terrorism.

Specification 6: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Queda, an international terrorist organization engaged in hostilities against the United States, had engaged in or engages in terrorism, intentionally provide material support or resources to al Queda, to wit: service or transportation to Usama bin Laden by transportation he was directly facilitating communication and planning used for acts of terrorism.

Specification 7: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: service as an armed body guard for Usama bin Laden, knowing that by providing said service as an armed bodyguard he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

Specification 8: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, an international terrorist organization has engaged in hostilities against the United States, had engaged in or engages in terrorism, intentionally provide material support or resources, to al Qaeda, to wit: service as an armed

Continuation of MC Form 458 Charges and Specifications Page 6 of 7

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### United States v. Hamden

body guard for Usama bin Laden by knowing that by providing said service as an armed body guard for Usama bin Laden be was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

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## **ATTACHMENT B**

- [The 803 session was called to order at 0942, 7 February, 2008.]
- 2 MJ: Court's called to order. All parties present when the
- 3 court last recessed are once again present. As near as I can tell,
- 4 it looks like we have two new representatives on the government side.
- 5 Counsel, would you introduce yourselves and state your qualifications
- 6 and status as to oath, please?
- 7 APROS [Mr. Oldham]: Your Honor, my name is Andrew Oldham. I
- 8 have been detailed to the Military Commission by the Chief
- 9 Prosecutor. I'm qualified to serve under RMC 503 and I have
- 10 previously been sworn in accordance with RMC 807. I have not acted
- 11 in any manner that might tend to disqualify me in this proceeding. I
- 12 am a civilian attorney with the Department of Justice.
- 13 MJ: Thank you.
- 14 APROS [Mr. Goldstein]: Your Honor, I am Jordan Goldstein. I
- 15 have been detailed to this Military Commission by the Chief
- 16 Prosecutor. I am qualified to serve under RMC 503 and have been
- 17 previously sworn in accordance with RMC 807. I have not acted in any
- 18 manner that might tend to disqualify me in this proceeding. I'm a
- 19 civilian attorney with the Department of Justice.
- 20 [The court reporter was present, was detailed to the Court-Martial by
- 21 the Convening Authority and was previously sworn.]
- 22 MJ: Very good. Thank you. I noticed that Lieutenant Mizer has
- 23 been promoted to Lieutenant Commander. Congratulations.

- 1 position to know--is <u>likely</u> to be in a position to know. Simply
- 2 because they occupy a position they are therefore <u>likely</u> to know?
- 3 That would definitely depend on the government's theory of our case
- 4 and how we intend to present our evidence as to whether or not
- 5 anybody would be in a position to know.
- 6 Secondly, whether or not Mr. Hamdan was a member of al
- 7 Qaeda--almost an undisputed fact in this case. We don't rely on
- 8 whether someone else knows or doesn't know--we rely on the statements
- 9 previously admitted in the hearing and found by Your Honor that Mr.
- 10 Hamdan pledged "bayat."
- 11 Whether he was a combatant and whether Mr. Hamdan
- 12 participated in the planning and execution of acts that allegedly
- 13 violated the Law of War, Your Honor, I'll moot that right now. We
- 14 don't contend that Mr. Hamdan was in the planning cell for the
- 15 attacks in East Africa Embassy bombings. We don't allege that Mr.
- 16 Hamdan was in the planning cell for the attack on the COLE and
- 17 certainly we do not contend that Mr. Hamdan was in the planning cell
- 18 for the attacks in New York City and the Pentagon on the 11th of
- 19 September.
- The defense goes on to say, "The potential witnesses likely
- 21 have material and relevant evidence." And at least one witness "may"
- 22 possess exculpatory evidence.

- 1 PROS [LTC Britt]: I'm reading from--again--the defense's brief,
- 2 and this would be attachment----
- 3 MJ: This is the 4 December motion?
- 4 PROS [LTC Britt]: Yes, sir. Attachment C--I'm sorry, moving
- 5 on--attachment D. I apologize. And, one more correction-it's
- 6 attachment E. It's attachment F--we're going to go no further. It's
- 7 attachment F. Defense's brief page 2.
- 8 MJ: I think you finally got it right.
- 9 PROS [LTC Britt]: I think I got it right, Your Honor.
- 10 ADDC [Mr. Schneider]: We'll stipulate it's "F".
- 11 PROS [LTC Britt]: But again directing Your Honor's attention to
- 12 the bottom of page 2; the statement in the clause that specifically,
- 13 "relevance and necessity of training." Here's the relevance we find.
- 14 Mr. Mohammed's alleged role in al Qaeda suggests he will be able to
- 15 testify as to whether Mr. Hamdan was also a member of that
- 16 organization and whether he participated in the planning or execution
- 17 of acts that allegedly violated the Law of War.
- 18 Again, we are not contending that Mr. Hamdan planned and
- 19 was involved in planning or executing any of the actions which I
- 20 previously stated. Moving to Ramsey Bin al Sheib. Again, synopsis
- 21 of expected testimony similar if not identical--the showing that was
- 22 previously made. We learn that Mr. Hamdan, according to Mr. Bin al
- 23 Sheib, may or may not be a member of al Qaeda or that he was not

- 1 relevant knowledge. Before he might have, but now he has it, but we
- 2 don't learn what that is. What we receive is; is not an exculpatory
- 3 showing but an inculpatory showing. "Because he will substantiate
- 4 Hamdan's claims that he's only a member of Osama bin Laden's motor
- 5 pool." Well, that's one of the things that we're contending, is
- 6 that, in fact, that Mr. Hamdan was Osama bin Laden's driver. That's
- 7 not exculpatory. "And that he did not have advance knowledge of the
- 8 attacks of September the 11th, and that he did not participate in the
- 9 planning or execution of those attacks."
- 10 We would contend the evidence will show that Mr. Hamdan
- 11 did not have advanced knowledge of that specific incident that
- 12 occurred on September the 11th, though he did in fact know some big
- 13 event, perhaps an attack, was looming prior to September the 11th.
- 14 Moving on to Ramsey Bin al Sheib, again we have the
- 15 statement, "he has relevant knowledge" before, "he might have". But
- 16 now in that month and a half he now has. He had, "he was the
- 17 communications link between KSM and military committee in
- 18 Afghanistan, including those who execute the attacks of September the
- 19 11th." And he knows the details of the plot and the identities of
- 20 those involved.
- 21 Again, we do not contend that Mr. Hamdan was a member of
- 22 the planning cell on any of the attacks that occurred against the
- 23 United States coalition--American or coalition interests.

- 1 of detainees here in Guantánamo. There are high-value detainees and
- 2 there are regular detainees. The additional requests didn't
- 3 incorporate any other additional detainees. Now in our discovery
- 4 we've turned over to the defense, there are relevant individuals with
- 5 relevant information. But the request for access simply is, "Give us
- 6 more high-value detainees."
- 7 And who do we see in this group? We see Abdul Rahim
- 8 Nasiri. And again he's alleged to be the principal planner of
- 9 attacks on the USS COLE and the Limburg, and he's the only person who
- 10 knows the details and identities of those involved in these attacks.
- 11 And he's known Hamdan since 1996, based on their travels, and he was
- 12 also very close with Osama bin Laden and he frequently would have
- 13 interacted with Hamdan. "He frequently would have"--that's a
- 14 supposition, of course that he would have, maybe not.
- He was in a position to observe Hamdan's relationship to al
- 16 Qaeda and Osama bin Laden and therefore he is material to Hamdan's
- 17 defense because he will state that Hamdan was only a member of the
- 18 motor pool and not involved in terrorist activities.
- 19 Again, that's an inculpatory statement and whether or not
- 20 he was involved in terrorist activities, we never alleged he was a
- 21 member of the planning and execution cell of al Qaeda.

From: McMillan, Joseph M. (Perkins Coie)

**Sent:** Tuesday, March 11, 2008 4:21 PM

To:

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC;

OGC; David, Steven, COL, DoD OGC;

OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD

OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC;

Subject: US v. Hamdan: Defense Motion to Dismiss Specification 1 of Charge I (Conspiracy)

Attachments: 14053027\_1.DOC; Def Motion to Dismiss Specification 1 of Charge I.pdf

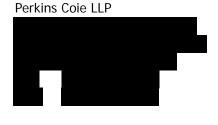
LTC

Attached for filing in the case of *United States v. Hamdan* please find the Defense Motion to Dismiss Specification 1 of Charge I (Conspiracy). The PDF version is signed and includes attachments. The Word version is unsigned and does not include attachments.

<<14053027\_1.DOC>> <<Def Motion to Dismiss Specification 1 of Charge I.pdf>>

Very respectfully,

Joe McMillan



NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

### UNITED STATES OF AMERICA

**GOVERNMENT'S RESPONSE** 

v.

## **SALIM AHMED HAMDAN**

To the Defense's Motion to Dismiss Specification 1 of Charge I (Conspiracy)

18 March 2008

- 1. **Timeliness:** The Government's response to the Defense's Motion to Dismiss Specification 1 of Charge I (Conspiracy) ("Motion to Dismiss") is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b).
- a. Although the Government's response is timely, the Defense's Motion to Dismiss is *untimely* and should be struck. Pursuant to this Court's scheduling order of 20 December 2007, all law motions were due no later than 9 January 2008. The Court's subsequent 15 February 2008 scheduling e-mail did not extend the deadline for filing law motions, and, in fact, did not mention law motions at all—presumably because the Military Judge had determined that all law motions had already been filed by that point.
- b. The Defense's Motion to Dismiss, however, was filed on 11 March 2008—over two months after all law motions were due. The Defense claims that it was impossible for it to have filed its Motion to Dismiss in a timely fashion because the arguments to which it was responding were "heard by the Defense for the first time, in open court at the 7 February 2008 hearing and on written statements made in the Prosecution's subsequent 28 February 2008 Motion for Reconsideration of the Military Judge's 13 February 2008 Ruling on Motion to Compel Access to High Value Detainees D 011." Mot. to Dismiss at 1. However, as the Government's 10 May 2007 charge sheet makes clear, the accused had been charged by that time under both the "agreement" and the "enterprise" theories of liability for the Conspiracy offense. See United States v. Hamdan, Referred Charges at 3-4 (10 May 2007). Presuming that the Defense read the charge sheet prior to 9 January 2008, it could have objected to the enterprise theory pled therein in a timely fashion and well within this Court's 9 January deadline. This is, in fact, what defense counsel in the *Khadr* case did in filing a timely response to the Conspiracy charge in that case. See United States v. Khadr, Defense Motion to Strike Surplus Language from Charge III (11 Jan. 2008). Because the Hamdan Defense has presented no reasonable basis for its laches, the Motion to Dismiss should be struck as untimely.
- **2. Relief Requested:** The Government requests that the Motion to Dismiss be struck as untimely. Even considered on its merits, the Government respectfully submits that the Motion should be denied.

#### 3. Overview:

- a. The enterprise theory of liability for Conspiracy set forth in the Manual for Military Commissions ("MMC") is authorized by section 950v(b)(28) of the Military Commissions Act of 2006 ("MCA"). The Secretary of Defense has reasonably construed the MCA's use of the word "conspires" to include both entering into an agreement for an unlawful purpose as well as joining an enterprise of persons who share a common criminal purpose. That reasonable interpretation of an ambiguous statutory text—pursuant to an express statutory delegation from Congress—is entitled to deference under the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).
- b. The Government has alleged facts sufficient to sustain each element of the Conspiracy offense under both the "agreement" and "enterprise" theories of liability.
- c. This Court should reject the Defense's flawed attempt to invoke *Scales v. United States*, 367 U.S. 203 (1961). As an initial matter, *Scales* is wholly inapplicable to the accused, since it is premised on the Supreme Court's application of the Due Process Clause and First Amendment—neither of which applies to the accused. Second, even if those constitutional protections did apply, *Scales* has no applicability to the present case because the accused is not being tried under Charge I with "merely" being a member of an illegal organization; rather, he is being tried for *conspiring* to commit various violations of the law of war *and* for committing an overt act in furtherance thereof. Accordingly, the Defense's reliance on *Scales* is baseless.
- **4. Burden and Persuasion:** The Defense is correct that, as the moving party, it bears the burden of persuasion. *See* Rule for Military Commissions ("RMC") 905(c)(2)(A); Military Commission Trial Judiciary Rules of Court, Rule 3(7)(a).

### 5. Facts:

a. Specification 1 of Charge I (Conspiracy) alleges that the accused conspired and agreed with Usama bin Laden and others to commit various violations of the law of war, including transporting and delivering weapons, ammunition or other supplies to al Qaeda members and associates. See Hamdan, Referred Charges at 3-4. Specification 1 also alleges that the accused knew the unlawful purpose of the agreement and knowingly committed several overt acts in order to accomplish an objective or purpose of the agreement. See id. Thus, the Defense is incorrect when it states that "[i]n support of Specification 1 of Charge I, the Prosecution appears to be solely relying upon allegations that Mr. Hamdan 'join[ed] an enterprise of persons know [sic] as al Qaeda . . .

<sup>&</sup>lt;sup>1</sup> The Prosecution has confined its factual statement to those facts relevant to the disposition of this motion. The other facts cited in the Defense's Motion to Dismiss are irrelevant to the disposition of the present motion, and the Prosecution sees no need to respond to them specifically. The Prosecution emphatically does not concede their accuracy.

shar[ing] a common criminal purpose . . . . ' Charge Sheet at 3." Mot. to Dismiss at 3 (first and third alteration added).

b. Specification 1 also alleges that the accused joined an enterprise of persons known as al Qaeda, which organization engaged in hostilities against the United States and whose members shared a common criminal purpose involving the commission or intended commission of one or more substantive offenses under the MCA. See id. at 3. Specification 1 also alleges that the accused knew the unlawful purpose of this criminal enterprise and joined it willfully, with the intent to further its unlawful purpose. The accused is also alleged to have committed several overt acts in order to accomplish an objective or purpose of the enterprise. See id. at 3-4.

### 6. Discussion:

# a. THE CONSPIRACY OFFENSE IN THE MANUAL FOR MILITARY COMMISSIONS IS AUTHORIZED BY THE MILITARY COMMISSIONS ACT.

- i. Section 950v(b)(28) of the MCA codifies as a violation of the law of war the offense of Conspiracy, and provides that "[a]ny person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy" is guilty of Conspiracy. The MMC was promulgated by the Secretary of Defense, pursuant to an express delegation of authority from Congress. See MCA § 3(b) ("[T]he Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions . . . "). The MMC implements the MCA and is entitled to deference with respect to ambiguous provisions of the MCA. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984); see also United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("A very good indicator of delegation meriting Chevron treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed.").
- ii. In Chevron, the Supreme Court articulated a rule, to which it has adhered ever since, that "[i]f... the court determines Congress has not directly addressed the precise question at issue, ... the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843; see also id. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer ...."). As the D.C. Circuit recently explained,

Under step one [of *Chevron*], the court asks "whether Congress has directly spoken to the . . . issue;" if Congress' intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However, if the court determines that "Congress has not directly addressed

the precise question at issue," *id.* at 843, then, under step two, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* 

Envtl. Def., Inc. v. EPA, 509 F.3d 553, 559 (D.C. Cir. 2007) (alteration in original).

- iii. The MCA does not define the word "conspires." That definition has been supplied by the Secretary of Defense, acting pursuant to an express delegation of authority under section 3(b) of the MCA to promulgate the Manual for Military Commissions. The MMC reasonably interprets the word "conspires" as including two possible meanings: First, the MMC interprets "conspires" as including "enter[ing] into an agreement with one or more persons." MMC, Part IV-6(a)(28)(b)(1). Second, the MMC interprets the word "conspires," as used in the MCA, to include "join[ing] an enterprise of persons who shared a common criminal purpose." *Id.*
- iv. The word "conspires" is ambiguous and is susceptible of multiple definitions. For example, the American Heritage Dictionary lists two definitions for the word "conspire": (1) "[t]o plan together secretly to commit an illegal or wrongful act or accomplish a legal purpose through illegal action"; and (2) "[t]o join or act together; combine." Similarly, the Oxford English Dictionary defines "conspire" both as "agree[ing] together to do something criminal, illegal, or reprehensible," and "combin[ing] privily for an evil or unlawful purpose."
- v. "In determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning." *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 255 (1997) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981), and *Richards v. United States*, 369 U.S. 1, 9 (1962)). The word "conspires" in section 950v(b)(28) may reasonably be interpreted as (1) agreeing to do something illegal, (2) joining an enterprise for an illegal purpose, or (3) both. The Secretary of Defense has reasonably interpreted the word "conspires" to cover both forms of conspiring, and that interpretation of an ambiguous provision is entitled to deference by this Court. *See Chevron*, 467 U.S. 842-45.
- vi. It is no answer to respond, as the Defense does, that the President has interpreted similar language in Article 81 of the Uniform Code of Military Justice ("UCMJ") differently. See Manual for Courts-Martial ("MCM"), Part IV-5(b). As the Supreme Court recently explained, "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005). In Brand X, the Federal Communications Commission ("FCC") interpreted an ambiguous statutory term contrary to the Court of Appeals' prior construction of that term. Notwithstanding that the FCC in effect "reversed" a prior judgment, the Court held that the FCC's recent interpretation of the ambiguous statutory text was entitled to deference under Chevron. See id. at 982-83. Similarly, the Court noted that an agency's changed interpretation of an ambiguous statute it is charged with administering is as entitled to deference as its

initial interpretation of that statute. See id. at 981-82 ("That is no doubt why in Chevron itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.") (citing Chevron, 467 U.S. at 857-58).

- vii. So, too, here, the meaning of the word "conspires" in UCMJ Article 81 and MCA § 950v(b)(28) is ambiguous. The President has reasonably interpreted it, in the context of courts-martial, to mean "[t]hat the accused entered into an agreement with one or more persons to commit an offense under the code." MCM, Part IV-5(b)(1). The Secretary of Defense has *also* reasonably interpreted the word "conspires," in accordance with its ordinary meaning, to include both "enter[ing] into an agreement with one or more persons," as well as "join[ing] an enterprise of persons who shared a common criminal purpose." MMC, Part IV-6(a)(28)(b)(1). Both the President's and the Secretary of Defense's interpretations of the word "conspires" are reasonable, and both are entitled to deference under *Chevron*.<sup>2</sup>
- Moreover, the Defense's argument ignores that many of the offenses triable by military commissions have unique international law aspects not contemplated by offenses listed in the MCM, which does not purport to list or codify all of the offenses traditionally triable by military commission or the law of war. Moreover, as the Government has previously argued, there is ample historical precedent for criminalizing the enterprise theory of Conspiracy as a violation of the law of war. See, e.g., United States v. Göring, et al. (1 Oct. 1946), in Trial of The Major War Criminals Before the International Military Tribunal, Judgment, Vol. I, at 256 (1947) ("A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose."); Military Commissions, 11 Op. Atty. Gen. 297, 312 (1865) ("[T]o unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.") (emphasis added). As these precedents demonstrate, joining a band or enterprise that violates the law of war is itself a violation of the law of war. See generally United States v. Hamdan, Government's Response to the Defense's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Ex Post Facto) at 11-12, 15 (23 Jan. 2008).
- ix. Because the elements of the Conspiracy offense set forth in the MMC are reasonable interpretations of the word "conspires" in the MCA, those elements—

<sup>&</sup>lt;sup>2</sup> For example, in contrast to the Government's decision to prosecute (which is not entitled to Chevron-deference vis-à-vis the defendant's guilt, see, e.g., Gonzales v. Oregon, 546 U.S. 243, 264 (2006); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment)), Congress can impose criminal punishments upon those who violate rules promulgated by Executive Branch officials, see, e.g., United States v. Grimaud, 220 U.S. 506 (1911). The Grimaud Court emphasized that "when Congress [has] legislated and indicated its will, it [can] give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which [can] be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done." Id. at 511. Here, Congress expressly delegated to the Secretary the power to promulgate the elements of the MCA's substantive offenses, and the Secretary has reasonably done so.

including the "enterprise-prong" of the Conspiracy offense—are entitled to deference and have the force of law in this military commission. The accused's claim that the enterprise-prong is not supported by the text of the MCA should be rejected.

- b. THE GOVERNMENT HAS ALLEGED CONDUCT IN THE CHARGE SHEET THAT, IF TRUE, WOULD MAKE THE ACCUSED GUILTY OF CONSPIRACY UNDER <u>BOTH</u> ITS "AGREEMENT" THEORY OF LIABILITY <u>AND</u> UNDER ITS "ENTERPRISE" THEORY.
- i. The purpose of a charge sheet is to notify the accused of the charges against him and to specify "in a plain, concise, and definite statement" the "essential facts constituting the offense charged." RMC 307(c)(3). "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." *Id.* That is exactly what the charge sheet against the accused does.

# ii. "Agreement" theory of liability.

- (a) The accused "entered into an agreement": The first element of the "agreement" theory of liability of the Conspiracy offense under the MMC is that the accused "entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission." MMC, Part IV-6(a)(28)(b)(1). That is precisely what is alleged in the charge sheet.
- (1) Specification 1 of Charge I (Conspiracy) alleges that the accused "conspire[d] and agree[d] with Usama bin Laden, Ayman al Zawahari, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al Adel and various members and associates, known and unknown, of the al Qaeda organization." *Hamdan*, Referred Charges at 3. The specification also alleges, among other things, that the accused (1) "transported and delivered weapons, ammunition or other supplies to al Qaeda members and associates," (2) "drove or accompanied Usama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures"; and (3) "received weapons training in Afghanistan." *Id.* at 3-4.
- (2) The accused's "conspir[ing] and agree[ing]" with Usama bin Laden and others constitute "entering into an agreement." Similarly, the accused's transporting of weapons to members of al Qaeda, driving Usama bin Laden to various training camps, and receiving weapons training in Afghanistan constitute substantive offenses under the MCA, including the provision of material support for terrorism. See MCA § 950v(b)(25); MMC, Part IV-6(a)(25). In fact, those very activities were pled as part of the specifications for Charge II against the accused (providing material support for terrorism). See Hamdan, Referred Charges at 4-7.
- (3) Accordingly, sufficient facts have been pled that, if true, would make the accused guilty of "entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission." MMC, Part IV-6(a)(28)(b)(1).

- (b) The accused "knew the unlawful purpose of the agreement": The second element of the "agreement" theory is that the accused "knew the unlawful purpose of the agreement." MMC, Part IV-6(a)(28)(b)(2). That is precisely what is alleged in the charge sheet. The charge sheet alleges that the accused "knew the unlawful purpose of the agreement" with Usama bin Laden and the other persons referenced in the charges. Hamdan, Referred Charges at 3. Clearly, these facts, if true, satisfy the second element of the Conspiracy offense.
- (c) The accused "knowingly committed an overt act": The third element of the "agreement" theory is that the accused "knowingly committed an overt act in order to accomplish some objective or purpose of the agreement." MMC, Part IV-6(a)(28)(b)(3). That is precisely what is alleged in the charge sheet.
- (1) As discussed above, the charge sheet alleges five overt acts, including transporting and delivering weapons, ammunition or other supplies to al Qaeda members and associates, of which the accused is alleged to have committed at least one of them. See Hamdan, Referred Charges at 3. As the comments in the MMC to the Conspiracy offense explain:

The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. It is not essential that any substantive offense, including the object offense, be committed.

MMC, Part IV-6(a)(28)(c)(4). Because the alleged overt acts were "knowingly committed . . . in order to accomplish some objective or purpose of the agreement," the third element of the Conspiracy offense is easily satisfied.

### iii. "Enterprise" theory of liability.

- (a) The accused "joined an enterprise": The first element of the "enterprise" theory of liability of the Conspiracy offense under the MMC is that the accused "joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission." MMC, Part IV-6(a)(28)(b)(1). That is precisely what is alleged in the charge sheet.
- (1) Specification 1 of Charge I (Conspiracy) alleges that the accused

join[ed] an enterprise of persons known as al Qaeda, and said al Qaeda engaged in hostilities against the United States, including the 1998 attacks against the American Embassies in Kenya and Tanzania, the 2000 attack against the USS Cole, the September 11, 2001 attack against the United States and other, separate attacks, continuing to date . . . .

Hamdan, Referred Charges at 3.

- (2) Under the facts alleged, the accused "joined an enterprise of persons" (i.e., al Qaeda), "who shared a common criminal purpose" (i.e., attacking the United States and its allies in violation of the law of war), which "involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission" (i.e., "attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism"). MMC, Part IV-6(a)(28)(b)(1); Hamdan, Referred Charges at 3.
- (3) Accordingly, sufficient facts have been pled that, if true, would make the accused guilty of "join[ing] an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission." MMC, Part IV-6(a)(28)(b)(1).
- (b) The accused "knew the unlawful purpose of . . . the common criminal purpose of the enterprise": The second element of the "enterprise" theory is that the accused "knew the unlawful purpose of . . . the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose." MMC, Part IV-6(a)(28)(b)(2). That is precisely what is alleged in the charge sheet. The charge sheet alleges that the accused "knew the unlawful purpose of . . . the enterprise and joined willfully, with the intent to further said unlawful purpose." Hamdan, Referred Charges at 3. Clearly, these facts, if true, satisfy the second element of the Conspiracy offense.
- (c) <u>The accused "knowingly committed an overt act"</u>: The third element of the "enterprise" theory is that the accused "knowingly committed an overt act in order to accomplish some objective or purpose of the . . . enterprise." MMC, Part IV-6(a)(28)(b)(3). That is precisely what is alleged in the charge sheet.
- (1) As discussed above, the charge sheet alleges five overt acts, of which the accused is alleged to have committed at least one of them. *See Hamdan*, Referred Charges at 3. Because the alleged overt acts were "knowingly committed . . . in order to accomplish some objective or purpose of the . . . enterprise" (i.e., al Qaeda), the third element of the Conspiracy offense is easily satisfied.
- iv. Because the charge sheet alleges facts sufficient to sustain each element required for liability under both the "agreement" and "enterprise" theories of the Conspiracy offense, the Defense's Motion to Dismiss should be denied.<sup>3</sup>

<sup>&</sup>lt;sup>3</sup> For the above reasons, the Defense's citations to the 7 February 2008 hearing and the 29 February 2008 Motion for Reconsideration are irrelevant. *See* Mot. to Dismiss at 3. Hamdan is not accused of having planned 9/11 or the attack on the USS Cole. Rather, Hamdan is charged with, among other things, conspiring to commit various violations of the law of war (separate and apart from the events of 9/11 and the Cole attack), and with committing one or more overt acts in furtherance thereof. Nothing the Prosecution said in the 7 February hearing or in its 29 February motion in any way undermines those charges.

# c. THE DUE PROCESS CLAUSE DOES NOT APPLY TO THE ACCUSED, AND, EVEN IF IT DID, THE SCALES LINE OF CASES IS INAPPLICABLE.

- i. The accused analogizes joining al Qaeda to joining the Communist Party, and concludes that because "merely" joining the Communist Party is not a crime, the accused is not guilty of Conspiracy in the present case. *See* Mot. to Dismiss at 11. This argument is riddled with flaws.
- ii. First, the line of cases upon which the accused relies is based on the Due Process Clause. For example, in *Scales v. United States*, 367 U.S. 203 (1961), the Supreme Court *affirmed* a conviction under the Smith Act for being a member of the Communist Party "with knowledge of the Party's illegal purpose and a specific intent to accomplish overthrow 'as speedily as circumstances would permit." *Id.* at 206. The Court also recognized that mere membership in an organization engaged in illegal *advocacy* (which emphatically does *not* describe al Qaeda) could generally not be criminalized under the Due Process Clause. *See id.* at 224-25.
- iii. As an initial matter, we note that another military commission, see United States v. Hamdan, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, slip op. at 9 (Mil. Comm'n 19 Dec. 2007) (Allred, J.), and the U.S. Court of Appeals for the D.C. Circuit, see Boumediene v. Bush, 476 F.3d 981, 992-93 (D.C. Cir. 2007), have already rejected the Defense's claim that the Constitution and/or the Due Process Clause applies to alien enemy combatants detained in Guantanamo Bay, Cuba, who have no connection to the United States other than their confinement. See also Johnson v. Eisentrager, 339 U.S. 763, 782-85 (1950); Rasul v. Myers, 512 F.3d 644, 665 n.15 (D.C. Cir. 2008) ("Boumediene is currently before the Supreme Court on certiorari review. Nevertheless, we must follow Circuit precedent until and unless it is altered by our own en banc review or by the High Court.") (citations omitted). Accordingly, the statements in Scales regarding the First Amendment and Due Process Clause are inapplicable to the accused.
- iv. Moreover, even if the Due Process Clause did apply to the accused, or even if the due process principles articulated in *Scales* were otherwise applicable to the accused, *Scales* is irrelevant to this case. The Defense apparently believes that the accused has been charged with "merely becom[ing] a member of an illegal organization." Mot. to Dismiss at 11 (quoting *Scales*, 367 U.S. at 227). But that is not the case. Rather, the accused has been charged with *Conspiracy*, an offense that has three separate elements, only the first of which implicates the joining of a criminal enterprise. In order to be guilty under the enterprise theory of liability for Conspiracy, an accused must *also* (1) know the unlawful purpose of the criminal enterprise *and* join it willfully, i.e., with the intent to further its unlawful purpose; and (2) commit an overt act to accomplish some objective or purpose of the enterprise. *See* MMC, Part IV-6(a)(28)(b)(2), (3).
- v. Moreover, the Court in *Scales* contrasted passive membership in a group with the instant offense of Conspiracy:

It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that "act" alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. It may indeed be argued that such assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent, for instance, by a commitment on the part of a conspirator to act in furtherance of that enterprise. A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.

Scales, 367 U.S. at 227-28 (emphasis added). Unlike a mere passive member of an organization, the accused has, in fact, committed "to further [a criminal enterprise] by an[] act or course of conduct." *Id.* That is what the "overt act" element of the Conspiracy offense requires, and that is precisely what has been alleged in the charge sheet. Because the accused has been charged with conduct that may be criminalized, even under *Scales*, the accused's reliance on that decision is baseless.

#### d. Conclusion

- i. The Defense's Motion to Dismiss should be struck as untimely. Even considered on its merits it is easily rejected. First, the enterprise theory of liability for the Conspiracy offense under the MMC is statutorily authorized by the MCA, and the Secretary's interpretation of the MCA's Conspiracy offense is entitled to deference under *Chevron*. Second, the Government has alleged facts sufficient to sustain each and every element of the Conspiracy offense under both the agreement theory of liability and under the enterprise theory. Third, the Defense's reliance on *United States v. Scales* is inappropriate, because *Scales* was a constitutional decision and therefore has no applicability to the accused. And fourth, even if the Constitution does apply to the accused, *Scales* is irrelevant here because the accused is not being tried under Charge I with "merely" being a member of an illegal organization, but rather with *conspiring* to violate the law of war, and for committing an overt act in furtherance thereof. Accordingly, the Defense's Motion to Dismiss should be denied.
- 7. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the Motion to Dismiss should be readily denied. Should the Military Judge order the parties to present oral argument, the Government is prepared to do so.
- **8. Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.
- 9. Certificate of Conference: Not applicable.
- 10. Additional Information: None.

Respectfully submitted.

WILLIAM B. BRITT LTC, JA, USAR Prosecutor

TIMOTHY D. STONE LCDR, JAGC, USN Prosecutor

JOHN MURAHY DEPARTMENT OF JUSTICE Prosecutor

CLAYTON TRIVETT
OFFICE OF MILITARY COMMISSIONS
Prosecutor

From: Murphy, John, Mr, DoD OGC

Sent: Tuesday, March 18, 2008 2:45 PM

To:

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC;

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OGC; Prasow, Andrea, Ms, DoD OGC; Pagel,

Bruce, COL, DoD OGC

Subject: US v Hamdan - Govt's Resp to Def MTD Spec 1 of Chg 1 (Conspiracy)

Attachments: US v Hamdan - Govt's Resp to Def MTD Spec 1 of Chg 1 (Conspiracy).pdf

Sir,

Attached please find prosecution response.

VR

John F. Murphy